MANITOBA OMBUDSMAN

Report on the Licensing and Enforcement Practices of Manitoba Water Stewardship

April 2008

Prepared By:

IRENE A. HAMILTON, MANITOBA OMBUDSMAN

MEL HOLLEY, SENIOR INVESTIGATOR
SYSTEMIC INVESTIGATIONS
OFFICE OF THE MANITOBA OMBUDSMAN

CORINNE CARON, MANAGER INVESTIGATIONS
OFFICE OF THE MANITOBA OMBUDSMAN

JANET WOOD, MANAGER INVESTIGATIONS*
OFFICE OF THE MANITOBA OMBUDSMAN

ROBERT GATES, INVESTIGATOR*
OFFICE OF THE MANITOBA OMBUDSMAN

JOE GALLAGHER, INVESTIGATOR*
OFFICE OF THE MANITOBA OMBUDSMAN

ROB MACNEIL, INVESTIGATOR
OFFICE OF THE MANITOBA OMBUDSMAN

CHRIS CAMPBELL, INVESTIGATOR
OFFICE OF THE MANITOBA OMBUDSMAN

With assistance from Larry Lewarton, Principal, Value for Money Audit Services, Office of the Auditor General

*Ms Wood, Mr. Gates and Mr. Gallagher are no longer with the Office of the Ombudsman

2008-06098/

Manitoba Ombudsman

750 – 500 Portage Avenue
Winnipeg, Manitoba R3C 3X1
Telephone: (204) 982-9130
Toll Free in Manitoba:
1-800-665-0531
Fax: (204) 942-7803
E-mail: ombudsma@ombudsman.mb.ca
500 av. Portage, Pièce 750
Winnipeg (MB) R3C 3X1
Telephone : (204) 982-9130
Sans frais au Manitoba :
1 800 665-0531
Télécopieur : (204) 942-7803
Courriel : ombudsma@ombudsman.mb.ca

April 30, 2008

The Honourable George Hickes
Speaker of the Legislative Assembly
Province of Manitoba
Room 244 Legislative Building
Winnipeg MB R3C 0V8

Dear Mr. Speaker:

I am pleased to submit a Report regarding the Licensing and Enforcement Practices of Manitoba Water Stewardship to be tabled before the Members of the Legislative Assembly in accordance with section 43 of *The Ombudsman Act*.

Yours truly,

Original Signed By

Irene A. Hamilton
Manitoba Ombudsman

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EXECUTIVE SUMMARY

INTRODUCTION

Pursuant to *The Water Rights Act* a person wishing to drain water off his or her property, onto the property of others, must first obtain a provincial licence. Responsibility for issuing drainage licences, and for investigating complaints about unlicensed drainage, rests with the Department of Water Stewardship (the department).

This investigation was undertaken to examine the underlying causes of problems identified in individual complaints against the department by rural landowners about damage caused by unlicensed drainage. The investigation of these complaints often confirmed the substance of the complainants' concerns. Serious underlying issues were identified including: significant resource shortfalls; confusion about the department's role and mandate; inadequate and outdated policies; deficient or non existent administrative procedures; and backlogs in both licence applications and complaints investigations.

As the investigation progressed it became apparent that municipalities, conservation districts and departmental staff have been concerned with the problems in drainage licensing and enforcement for quite some time.

In the investigation, we interviewed staff at all levels of the department. We met with executive representatives of the Association of Manitoba Municipalities and interviewed sixteen Manitoba conservation districts, conducting onsite interviews with fourteen of the sixteen.

We reviewed all relevant statutes and regulations, as well as all relevant policies and procedures. We reviewed various historical documents, and current information on evolving issues such as the environmental impact of agricultural drainage on the health of Lake Winnipeg.

The goal of an Ombudsman investigation is to achieve administrative improvement. Although the Ombudsman makes specific recommendations on administrative policy and process, implementation of those recommendations is the responsibility of the respondent department or agency, which is in the best position to determine the appropriate course of action to achieve that improvement.

During the course of the investigation, the department was in the process of reviewing and revising many of the policies and practices that had given rise to the issues and concerns we were raising. The department was also in the process of obtaining a significant increase in its resources allocated for licensing and enforcement responsibilities. To ensure a balanced report, our conclusions and recommendations needed to reflect the work that was accomplished as the investigation was progressing.

FINDINGS AND CONCLUSIONS

For many years, Manitoba Water Stewardship lacked the resources needed to meet the statutory obligations imposed upon it by *The Water Rights Act* (1987) with respect to drainage licensing and enforcement. There seems to be no dispute that the resources needed to fulfill that mandate have been inadequate since at least 1997.

The department has recently obtained additional resources, allowing it to significantly increase staff assigned to licensing and enforcement. The specific plan for the use of those additional resources, to address a significant backlog while at the same time dealing with new applications and complaints, remains a work in progress.

In addition to resource issues, specific concerns identified related to; the licence application and approval process; enforcement practices; technical capacity; inadequate environmental impact assessment; and deficiencies in administrative systems.

An awkward licence application process has contributed to both a backlog and to a practice of constructing drainage works without a licence. In some cases, applicants are required to

produce information they do not have, and cannot easily obtain. A practice has developed where departmental staff has assumed responsibility for obtaining information which, under the current framework, is the responsibility of the applicant to submit. The responsibilities of the applicant and the department in the licence application and approval process need to be clarified.

There is conflict between the statutory requirement that all water control works (including drainage) be licensed, and a departmental policy that seems to permit work considered to be maintenance without a licence. "Maintenance" is not defined by regulation or written policy. Its interpretation has been widely divergent, resulting in conflict over enforcement and licensing requirements. The terminology and the licensing requirements need to be clarified and communicated to those affected.

There is confusion about the rights of downstream landowners in relation to proposed drainage projects. The department's application form requires proof of consent from a downstream recipient of drained water. The department advises that this requirement is procedural in nature and that a project can proceed despite a downstream landowner's objection if it concludes such objection is without merit.

The department has acknowledged the need to address these issues and has undertaken a review of many of its licensing and enforcement policies. I am pleased to report the department has advised us that new policies have been drafted that will be implemented immediately.

Historically, enforcement to stop or prevent unlicensed drainage has been inadequate for a number of reasons. Specific enforcement powers have been weak and penalties have been too low to act as a deterrent to those who would break the law. There has not been adequate staff to exercise the enforcement powers that have existed.

Specific improvements have been made to the department's enforcement powers and new staff have been hired and trained. However, penalty provisions need to be further strengthened and a

mechanism is needed to halt unlicensed work immediately and to order prompt remedial action.

Enforcement should be functionally separated from the advisory role of the department in licensing. The department is attempting to achieve this separation by having additional professional staff, without enforcement responsibilities, provide the advisory and support services that in the past were often provided by staff also responsible for enforcement.

The department has had difficulty in both licensing and enforcement because of a lack of technical capacity. This is in part a resource and training issue and the department is attempting to improve its technical capacity through various means, including enhanced staff training. However, it is also related to the licensing model. An alternative licensing model operating as a pilot project proved more successful by employing an onsite review of drainage proposals. It involves the people who would be directly affected by the project and therefore, in the best position to provide information about the potential impact.

The licence application assessment and approval process can be improved through the involvement of conservations districts (where they are willing to participate), which provides access to local knowledge during an initial on site review. The department has committed to this. It is attempting to involve conservations districts in the short term through the assignment of staff to specific districts. It is also engaged in a consultative process that could significantly increase the role and responsibility of conservation districts in implementing provincial water policy. The department needs to ensure that the process underway facilitates the immediate use of the local knowledge within conservation districts when considering licence applications.

There is an acknowledged link between agricultural drainage and the health of Lake Winnipeg. The province has been unable to find a practical and scientifically sound means of completing an environmental impact assessment of drainage licence applications. As an alternative to assessments of each application, the department has produced guidelines that can assist both applicants and departmental staff in mitigating the environmental impact of drainage.

Users of the drainage licensing system should be informed about the need to consider the environmental impact of drainage and how to reduce that impact. I have recommended that the province prioritize its efforts to produce and publish an "environmentally friendly" drainage manual.

Our investigation identified long standing problems in the department's record keeping and file management systems. These problems made it difficult for departmental management to track and quantify their workload province wide, and for applicants and complainants to communicate with the department on files. These concerns are being addressed.

The requirements and provisions of the Act and Regulation relating to both licensing and enforcement, need to be clearly communicated to the public, as does the role of departmental staff and others involved in licensing decisions. The department needs to communicate its plan to address the current licensing and enforcement backlog, and its long term plan for processing licence applications and responding to complaints.

After providing our draft report to the department in December 2007, we received its responses and discussed our findings and conclusions. Those responses reflected the department's ongoing efforts to address both the specific administrative issues we had identified and the requirements of evolving provincial water policies.

At this point, I am satisfied that the department has initiated action intended to address all issues of concern that have been identified. To ensure that the department's action, and its implementation of the recommendations made in this report, result in the resolution of the problems identified, I have asked the department to provide me with annual updates on its progress.

RECOMMENDATIONS

1. **That the department clarify how technical information required of drainage licence applicants will be obtained and who will be responsible for the cost of obtaining that information; and that this be included in a policy available to applicants. I would ask that the department provide me with a copy of that policy. (Page 37)**

2. **That the department consider an amendment to *The Water Rights Act* to create a distinction between the creation of new water control works, and maintenance or minor works; and include a clear definition of "maintenance". (Page 69)**

3. **That the department consider an amendment to *The Water Rights Regulation* to create an expedited application process when appropriate for licensing maintenance and minor works. (Page 69)**

4. **That the department develop a plan, in consultation with conservation districts, to involve conservation districts in all licensing decisions based on the model currently in use within the Whitemud Watershed Conservation District. (Page 84)**

Enforcement

5. **That the department clearly distinguish between advisory and support functions, and the regulatory, or licensing and enforcement functions in policy and job descriptions. (Page 61)**

6. **That the department develop a policy to be consistently applied to take enforcement action when illegal drainage is occurring. (Page 56)**

7. **That *The Water Rights Act* enforcement powers and penalty provisions be amended to be consistent with the offence and penalty sections of *The Water Protection Act.* (Page 56)**

8. **That the department review whether statutory authority should be provided to allow drainage officers to issue immediate stop work orders and orders requiring remedial action. (Page 56)**

9. **That the department review the adequacy of enforcement measures available to staff to determine if further powers are needed to stop unlicensed drainage. (Page 56)**

Resources

10. **That the department develop a concrete and detailed work plan outlining how the new resources will be allocated to deal with the existing backlog, while also addressing new applications and enforcement concerns. (Page 76)**

11. **That the department develop a provincial database that requires that all licence applications and complaints are recorded. The database needs to allow the tracking of applications and complaints from acceptance to conclusion. This database should include the necessary forms and a mechanism that permits management to monitor progress. (Page 64)**

12. **That the department assess staff and resources necessary for a new licensing process. (Page 84)**

Communication

13. **That the department complete and publish its proposed "environmentally friendly" drainage manual as a priority. (Page 49)**

14. That the department advise conservation districts of the restructuring of the Water Control Works and Drainage Licensing section, and its plans for addressing the licensing and enforcement backlog, and discuss the role conservation districts wish to play in this process. (Page 84)

15. That the department develop a clear public policy on enforcement and communicate it to municipalities, conservation districts and the general public. (Page 61)

DEPARTMENTAL RESPONSE

From December 2007 to April 2008, we discussed our findings and draft report with the department, and invited officials to provide comments and respond to specific concerns. We believe that this process allowed us to directly communicate the concerns of those affected by water licensing and enforcement with the department. We were also able to highlight the administrative improvements we believe are necessary to address the concerns identified by our investigation.

It also provided me with an understanding of the extent to which the department was working to address the concerns identified, and the department's commitment to restoring public confidence in the licensing and enforcement process.

In response to our final report the department wrote to us on April 21, 2008, to advise that:

> *"The Department of Water Stewardship would like to thank the Ombudsman's Office for its extensive work in reviewing the history of drainage concerns in Manitoba, and in creating this thorough report. Decisions on individual drainage projects can be complex, and need to balance the interests of affected landowners, the needs of agriculture and impacts on the environment.*
>
> *The Department accepts the Ombudsman's recommendations. As this report outlines, a number of significant changes have already occurred to meet the goals of Manitoba's water strategy. This report provides valuable assistance to the Department in taking*

stock of our progress to date and in reviewing our priorities for the future.

The Department believes that recent measures, together with the actions to address this report's recommendations, will result in a substantially more effective drainage licensing and enforcement system".

The full text of the Department's response is found at the end of this report.

CONCLUSION

I wish to thank the staff of the Department of Water Stewardship, who provided my office with complete cooperation throughout the course of this investigation. I also wish to thank the staff and board members of conservation districts who took the time to share their interest and knowledge with us, and the Association of Manitoba Municipalities for their valuable perspective and background information to this complex issue.

THE ISSUE

In addition to its natural waterways, Manitoba has constructed an extensive drainage system, comprised of thousands of kilometers of channels and ditches of various sizes, facilitating or enhancing agricultural production, transportation, and residential development.

Of necessity, drainage systems often cross private property lines and municipal boundaries. The removal of excess water, intended to alleviate a problem from one property, can transfer that problem to other properties downstream. Accordingly, in addition to an effective drainage system, there has to be an effective system for regulating the control and diversion of water and the impacts of such control or diversion on the rights of both downstream, and upstream, landowners.

Trends in the agricultural sector, the current wet cycle, and greater environmental awareness have come together to increase drainage-related conflicts in agricultural areas, and to increase public demand for drainage and for protection from its impacts. This has increased the need for timely drainage licensing and enforcement.

As a result of ongoing concerns in relation to licensing and enforcement action under *The Water Rights Act* (the Act), I wrote to the Deputy Minister of Manitoba Water Stewardship to advise that I was undertaking an investigation pursuant to section 15 of *The Ombudsman Act* to determine whether or not the department is currently meeting its obligations with respect to the enforcement provisions of the Act relating to unlicensed drainage.

DRAINAGE

Information received from Water Stewardship staff suggests that Manitoba's drainage system has evolved significantly over the past sixty years. *"An increase in agricultural productivity and its importance to the Manitoba economy dictated that a comprehensive drainage network strategy had to be developed to maximize agricultural land production. In the 1950s the Manitoba government took on the role of water management and began developing such a system"*.

There are currently 4500 kilometers of provincial waterways in Manitoba designated by Order in Council in accordance with *The Water Resources Administration Act.* The government is responsible for the maintenance of those waterways. Rural municipalities may undertake the construction and maintenance of municipal drainage infrastructure, which typically includes smaller natural waterways and municipal road ditches. Some conservation districts have entered into agreements with the government giving them authority over provincial waterways contained within the districts' boundaries, along with the responsibility for operation and maintenance.

Complaints concerning the adequacy of the drainage system are neither aimed at a particular level of government nor restricted to a particular area of the province. It has been suggested that our provincial drainage network has deteriorated, and the drains are no longer large enough to meet the demands of agriculture and they need to be redesigned and reconstructed.

Regardless of the location of drains or other water control works, property rights in water and the right to the use, control or diversion of water are vested in the crown. All drainage works in the province, other than those owned by the government, are subject to the licensing and enforcement provisions of *The Water Rights Act.*

LICENSING

The Act provides the framework for both drainage licensing and for the enforcement of measures designed to protect landowners and the environment from the negative impacts of drainage.

The Act prohibits anyone, including municipalities and conservation districts, from diverting water or building or operating "water control works" without a provincial licence.

The definition of "*water control works*" is broad and includes dykes, dams, surface and sub-surface drains, drainage, improved natural waterways, canals, and other contrivances for carrying or conducting water that "*temporarily or permanently alter the flow or level of water or that changes or may change the location or direction of flow of water*".

The provincial department currently responsible for licensing and enforcement is Manitoba Water Stewardship; formerly it was Manitoba Conservation and before that it was Manitoba Natural Resources.

The Act and *The Water Rights Regulation* give the government control over virtually every aspect of the licensing process, from the right to prescribe the form of the licence application and the supporting documentation that must accompany it, to the right to make licences subject to specific terms and conditions.

The Water Rights Regulation requires drainage licence applicants to describe the scope of the proposed work and the impacts, if any, on lands owned by others.

Pursuant to subsection 4(2) of the Regulation, anyone making an application for a licence to construct drainage works has to submit:

> *(a) a sketch or plan showing the body of water or area proposed to be drained;*
> *(b) a sketch or plan and description of the proposed drainage works and the proposed drainage outlet;*
> *(c) where the body of water proposed to be drained lies in whole or in part upon land not owned by the applicant, evidence that all riparian owners along the shoreline of the body of water have approved the proposed drainage;*
> *(d) where the water proposed to be drained will leave the applicant's land, evidence showing the approval of the recipient of the drained water.*

As well, the Regulation requires applicants to provide information concerning the impact of their project on other existing or proposed water control works, on irrigation and water supply, and on land use and resources. Applicants must submit:

> *(e) where any other existing or proposed works authorized under the Act are likely to be affected by the proposed drainage works, information showing any anticipated effects*

of the operation of the drainage works upon the effectiveness or operation of those other works;

(f) information showing any anticipated effects of the operation and the proposed drainage works upon irrigation or water supply generally and upon any future development for the purposes of irrigation or water supply generally;

(g) information showing any anticipated effects of the construction and operation of the proposed drainage works upon land within the watershed in which the proposed works are to be situated and upon the use of those lands and related resources and upon any other existing or future works in that watershed.

ENFORCEMENT

The Act provides the department with significant powers of enforcement in dealing with unlicensed works, beginning with the power to make a "ministerial order" (the order). Pursuant to subsection 4(1) of the Act, the order can require the person acting without a licence:

(a) to cease using or diverting the water; or

(b) to remove the works or water control works; or

(c) to cease controlling the water; or

(d) to repair or reconstruct or alter the works or water control works in a manner stated in the order.

The order can also impose specified time limits for any remedial action required.

There is a right of appeal to the Municipal Board (the board). Until 2005, an appeal to the board acted as a stay of enforcement of the order pending the outcome of the appeal. As a result of an amendment to the Act in 2005, an appeal to the board no longer acts as a stay but rather provides that if the appeal is successful, then the Minister may enter into an agreement with the appellant to compensate him or her for any loss or damage incurred as a result of the order.

If a person does not comply with an order, the department has the power, pursuant to subsection 4(3) of the Act to:

> *"...without further notice or legal process and at the expense of the person, do or cause to be done such things as he or she deems necessary to stop the use, diversion or control of the water, or cause the works or water control works to be breached, blocked, filled, demolished or removed or to be otherwise dealt with as he or she deems necessary or advisable to enforce the order, as the case may be".*

The Act also designates the cost of the remedial action taken by the department as a debt due to the crown, recoverable in court from the person to whom the initial order had been directed.

This is the statutory framework which has governed the licensing of drainage works, and the enforcement against those who engage in unlicensed drainage, since the Act came into existence in 1987. It serves as the foundation for the administrative programs and procedures designed to give effect to the intent and requirements of legislation.

ADMINISTRATIVE SYSTEMS

The goal of the administrative system created under this statutory framework appears straightforward; to regulate the impact of drainage by establishing a process whereby individuals wishing to drain water from their private property onto the property of others, may only do so upon application and the receipt of a licence from the government.

An obvious indicator of the success or failure of this goal is the department's ability to respond to public demand.

At the end of 2005, there was a backlog of approximately 700 outstanding licence applications and a backlog of approximately 1200 compliance inspections requiring determination whether water control works had been constructed in accordance with the licence conditions. As well, the department noted that there was a *"...substantial volume of complaints that remain unaddressed..."*.

The department described the backlog in drainage licensing activities as *"...amounting annually to fourteen (14) staff years of effort".*

While the department attempted to quantify the problem, other stakeholders described it in terms of system failure or complete breakdown.

Fundamental questions have arisen about whether the drainage licensing system can meet the needs of licence applicants, and whether the department has sufficient enforcement powers to deal with those entities that would operate outside the law, resulting in a loss of public confidence in the licensing and enforcement systems that the department is currently working to address.

PUBLIC VIEW OF THE PROBLEM

Members of the public interested in drainage issues have been expressing their concerns about the provincial drainage system, and licensing and enforcement within it, for over a decade. These concerns have been expressed individually by stakeholders at provincially sponsored forums, and collectively by organizations such as conservation districts and the Association of Manitoba Municipalities (AMM).

During our investigation, we reviewed available provincial documentation on public consultations, and written submissions to the government from the AMM. We also interviewed AMM executive staff to clarify and follow up on positions taken by the AMM with respect to water stewardship over the past eight years.

As well, we interviewed staff and board members from sixteen conservation districts to solicit their views on the problems causing the current provincial backlog. In the course of those interviews, we also discussed their views on what can be done to improve the drainage licensing and enforcement system as well as their role in such a system.

PUBLIC CONSULTATION

Between November 1997 and February 1998, over 700 people attended "open house" sessions and provided the department (then Natural Resources) with comments, concerns and suggestions about land drainage. A 1998 provincial report, Land Drainage Review, summarized participants' concerns. Of particular note were the equally high percentages of people expressing concern about the need for improved drainage on the one hand, and the downstream impact of other drainage works, both licensed and unlicensed, on the other.

The report of the review noted that:

> *"Overall, about forty percent of all respondents indicated that the key issue in their area was the need for some type of drainage work and about forty percent of all respondents*

indicated that the key issue was the impact of drainage works on downstream producers".

The review reported on the direct link between the perceived inadequacies of the existing agricultural drainage system and unlicensed drainage works:

"Across the province, drainage works are seen as having downstream impacts and the number of specific sketches submitted showing landowner conflicts was overwhelming.

On the other hand there was a much smaller but very concerned sector that felt that the existing system does not allow them to undertake the drainage works they require to produce efficiently and take advantage of the diversification opportunities open to the agricultural sector. These two concerns are directly related to the fact that no drainage, or an inadequate drainage system, precludes upstream landowners from draining legally. Unauthorized drainage without a system in place, increases problems downstream".

ASSOCIATION OF MANITOBA MUNICIPALITIES

The Association of Manitoba Municipalities (AMM) speaks on behalf of member municipalities to the government about issues of municipal concern. AMM documentation from 1999 and onward suggests that drainage licensing and enforcement have been topics of ongoing concern for members.

At annual conventions AMM members pass resolutions that serve to highlight their concerns and provide direction to the Association on issues to be raised with the government.

At its 1999 convention, the AMM membership passed a resolution that highlighted two issues of concern; multi-jurisdictional responsibility for drains and the inadequate functioning of those drains.

The resolution asserted that the department (then Manitoba Conservation) had "*...fragmented certain drains, creeks, and rivers into areas they service and maintain and leave other areas to the land owner or municipality, which results in these drains not functioning to their top capacity and causing severe flooding and channel changes*".

The resolution called upon the Association to, "*...lobby the province of Manitoba to make the Water Resources Branch or the local conservation districts responsible for maintaining these drains from the headwaters to the stream's mouth...*" (1999 AMM Convention Resolution # 57).

The language of resolutions passed at the 2001 AMM convention, suggests that concern about drainage problems was becoming more and more pronounced.

In one resolution the preamble stated, in part, that "*...the Department of Conservation has made little attempt to maintain drainage systems for which they are responsible...*". That resolution requested the Association to "*...lobby the province to undertake work on their drains to provide proper and adequate drainage...*" (2001 AMM Convention Resolution #30).

A subsequent resolution made reference to the delays in the licensing process, noting that "*...the regional water managers are clearly unable to meet the demands for licences from both the public and private sector, resulting in unreasonable delays in obtaining licences, licences being granted after the work is performed, and a significant amount of work proceeding without licences*".

The membership called upon the Association to "*...lobby the province to appoint a committee of provincial and municipal representatives to undertake a review of the licensing process with a view to either: a. Amending the legislation to limit the conditions in which licences are required, or b. Assigning additional staff to process licence applications within a reasonable time frame, or c. Both of the above...*" (2001 AMM Convention Resolution #34).

A 2005 convention resolution documented the AMM membership's view of the adequacy of the department's enforcement efforts, and the resources allocated to enforcement. The preamble of that resolution, entitled **Adequate Staffing for Drainage Enforcement,** set out a litany of concerns:

> *"WHEREAS the drainage of land is being undertaken across Agro-Manitoba for agricultural purposes;*
>
> *AND WHEREAS a licensing process exists but many landowners fail to apply for a Water Rights Licence to have their proposed drainage works authorized;*
>
> *AND WHEREAS when conditions outlined as part of the licence are not adhered to there is little or no enforcement by the appropriate Provincial Government Department;*
>
> *AND WHEREAS downstream landowners and residents who have legitimate concerns with unlicensed drainage works are forced to raise complaints with Manitoba Water Stewardship staff;*
>
> *AND WHEREAS there are problems in enforcing The Water Rights Act, and there is a lack of staff and/or an unwillingness to deal with illegal drainage activities".*

The resolution called for the AMM to "*...lobby the provincial government to ensure effective enforcement regarding illegal drainage activities" and "that a sufficient number of staff be allocated for this purpose...*" *(2005 AMM Convention Resolution #60).*

A 2006 convention resolution dealt with adequate staff resources for the department (now Water Stewardship), asserting that staff shortages had resulted in the department's "*...being unable to satisfactorily fulfill its obligations to municipalities...*" and calling upon the AMM to lobby the government to "*...adequately staff Manitoba Water Stewardship to expedite the licensing process and to provide for enforcement for drainage works...*" (2006 Convention Resolution #25).

In addition to meeting annually with government, the AMM also submits "issues" papers on selected topics.

In a 2004 submission to cabinet, the AMM noted problems with the licensing system, advising the government that "*Lack of funding is not the only drainage concern raised by our membership, as all too often municipalities are experiencing delays in receiving permits for drainage work, often because of a lack of staff in place to review project applications*".

We followed up on the AMM's concerns in a 2007 interview with executive representatives of the association. AMM representatives expressed views about licensing and enforcement similar to those we heard from individuals and conservation districts. The AMM told us that there is a perception that because the process of obtaining a licence is difficult and cumbersome, people proceed with drainage work, with the view that if they are caught, the fine they pay will be a type of "licensing fee".

We were also advised that there are instances where municipalities perform maintenance on provincial drains because it is easier to do it themselves than to wait for the government to do it.

AMM representatives told us that licensing, drainage and lack of enforcement remain the top three issues raised by municipalities.

Because of concerns expressed by departmental staff about licensing and enforcement in a multi-jurisdictional environment, we raised this matter with the AMM, whose response was that everyone, including the government, who does drainage work, should have a licence.

AMM members do not want a role in enforcement and view this as a provincial responsibility. They indicated that municipalities are continually frustrated with the department over its lack of involvement and follow through with licensing and enforcement.

The AMM is a strong supporter of, and advocate for, the "Whitemud model" of licensing (discussed later in this report) because it "*...gets all stakeholders together and does the licensing in the field*". They would recommend the model used in the pilot project be used as the process for all licensing decisions.

CONSERVATION DISTRICTS

Conservation districts are created by Order in Council, pursuant to *The Conservation Districts Act* (the CD Act), following an application from municipalities jointly wishing to form a district to pursue mutual conservation and land use goals. They are financed through a cost sharing formula by member municipalities and the government. Board members originate from various sub-districts within member municipalities. The scope of their authority is set out in the CD Act, and can include assuming responsibility for infrastructure such as water control works.

There are currently eighteen districts in Manitoba, with varying degrees of interest in and experience dealing with water issues. In the past some conservation districts have been extensively involved in drainage, while others have concentrated their efforts in other conservation areas. Because conservation district boards may become watershed planning authorities under *The Water Protection Act*, all districts have an interest in water and drainage issues. In all but one district, drainage and licensing have been identified by members as a concern.

During the course of the investigation we interviewed sixteen Manitoba conservation districts, conducting onsite interviews with fourteen of the sixteen.

Problems identified by conservation districts can be broadly classified into three categories: deficiencies in the current licensing mechanism; enforcement concerns; and the adequacy of the existing drainage system available for use by agricultural producers.

Some of the comments and concerns frequently expressed by conservation district staff and board members during interviews with Ombudsman investigators were:

Licensing Mechanism

- *That The Water Rights Act is obsolete and needs to be reworked to establish a consensus based model rather than a confrontational one.*
- *Long delays in the licensing process result in increased instances of illegal drainage, as farmers cannot wait the almost two years it takes to obtain a licence because of the impact that wet land has on potential crop production.*
- *The current licensing procedures do not take into consideration the cumulative downstream consequences of water drainage when determining eligibility for the licence. One consideration in licensing decisions must be the cumulative impact of the drainage project as the water proceeds downstream.*
- *The inconsistency in the licensing process also causes frustration because the guidelines are not clear about when a licence is or is not needed, whether a written application is required, and whether a licence is required in advance of constructing the drain.*
- *If a drain is built without a licence then there are no clear consequences, as the government is not enforcing the provisions of the Act. When enforcement action is taken, owners are not required to reverse the unlicensed drainage, but are often being licensed after the fact. Even if a licence is issued in advance of the drain being constructed, there is no follow up to determine compliance with the licence conditions.*
- *An informal policy has been developed by staff that appears to be contrary to the Act. It allows drainage without a licence if it is a clean out of an existing drain to a certain depth, and/or does not disturb the clay. The rules however are unclear and difficult to enforce.*
- *Vital information needed to consider a drainage licence application is lacking. The impact on the quality of surface water and the local knowledge of where that water goes and its cumulative effect is not considered.*
- *The provision requiring the permission of downstream landowners, before a drain is licensed, is ignored. Once built, downstream landowners have little hope of having the project changed regardless of its downstream impact.*

Enforcement Concerns

- *Many concerns were expressed about the failure of the government to take action against illegal drainage. The commonly held view is that the government must assert responsibility for enforcement in relation to drainage, that the enforcement must be consistent and that it should not result in drainage being licensed after the fact. Conservation districts believe that because there is no enforcement, landowners do what they want to benefit their own interests and act with impunity knowing that there will not be any action taken against them. This results in the licensing process becoming a mockery, particularly when, despite a complaint, the department issues a licence anyway. Enforcement cannot be effectively achieved by a system of fines. Landowners will view the fine simply as a cost of doing business. To effectively enforce the Act, Water Stewardship needs more staff.*

Drainage

- *There is no comprehensive surface water management plan. A provincial plan is needed in order to ensure a consistent approach that considers the impacts of drainage for all landowners who may receive water as a result. This lack of a cohesive plan promotes a localized philosophy that fails to recognize watershed impacts. The government has the responsibility for the creation of such a plan.*

Departmental Response to Concerns

In response to the concerns expressed above, the department responded as follows:

> *"The Department recognizes the historic shortfall in capacity to address drainage licensing and enforcement needs and has been working to fix it. In 2007, the Department created a new Water Control Works and Drainage Licensing Section with a total of 24 staff members, effectively doubling the staff available to work on licensing and enforcement issues. The Department is currently training and designating new Water Resource Officers, upgrading equipment to facilitate licensing and enforcement activities, and entering data on licence applications, complaints and enforcement*

activities into a GIS database to facilitate tracking, performance measurement, and reporting.

The Department is also working to strengthen enforcement powers through amendments to the Water Rights Act and the Offence Notices Regulation under the Summary Convictions Act. The Water Rights Act was amended in 2005, to ensure appeal of a Ministerial Order does not stay the Order, and again in 2006, to improve inspection powers and authorize searches and seizures of evidence. The Offence Notices Regulation was amended in early 2008, to introduce set fines for offences under The Water Rights Act.

Cumulative impacts are currently taken into account to the best of the Department's ability given the current gaps in watershed based planning and the technical challenges inherent in assessing those impacts. The primary focus of drainage licensing is to minimize the potential for negative impacts on upstream or downstream landowners, or on the environment. When individual drainage projects are licensed, consideration is given to cumulative impacts relating to capacity, incremental volume, timing or offsets in the runoff hydrograph, the ability of the receiving water body to handle increased flows from the proposed project, and the potential impacts on permanent or semi-permanent wetlands. Because license applications are for stand alone projects, each project is assessed individually or incrementally. The focus of this assessment is on the immediate catchment area, which would tend to feel negative impacts first and most dramatically. If local impacts are mitigated, they tend not to be transmitted further down or up the system.

Water quality impacts are more difficult to assess on an individual project basis. The Department tried to do this initially but soon found it was not feasible and decided on an alternate approach. The Department's Water Quality Section looked at groups of typical license applications and proposed best management practices that the Water Control Works and Drainage Licensing Section could incorporate into standard licensing conditions. This process is ongoing.

> *Regarding the need for a provincial surface water management plan, the Department is of the view that the most appropriate unit for surface water management planning is the watershed, and does not envision development of a single, comprehensive "provincial plan". However, watershed level planning must be accomplished within the context of a coherent provincial legislative, policy and program framework. While improvements can always be made (and are under active consideration), the Province has made substantial progress toward a complete provincial framework for local watershed surface water management planning. This framework includes: legislation such as The Water Protection Act, The Water Rights Act, and The Sustainable Development Act; policy documents such as the Manitoba Water Strategy, the Provincial Land Use Policies, and the Lake Winnipeg Stewardship Board Report; and memorandums of understanding that provide guidance to water planning authorities".*

PROVINCIAL ACTION

Many of the concerns giving rise to this investigation are long standing. Government has acknowledged these concerns to varying degrees in statements and documents reflecting its changing policies. They have also taken positive steps to address some of these concerns, and other measures are ongoing. Accordingly, our review of the licensing and enforcement system occurs in a context of much broader change.

While our review is intended to examine specific problems with the drainage licensing and enforcement system, we have found it impossible to examine those problems in isolation. There is some evidence, and a strongly held public view, that problems in drainage licensing and enforcement are related to the overall health and adequacy of the drainage system. As well, based on current government policy and practice, it appears that parties, in addition to the department, should have input into the licensing process.

Similarly, when examining the government's actions in response to these issues, it is important to acknowledge that those actions go beyond specific measures related to the licensing and enforcement system under *The Water Rights Act*. The purpose of *The Water Rights Act* is very

specific - to prescribe licensing and enforcement requirements for all property in, and all rights to the use, diversion or control of, all water in the province. It does not reflect all of the water protection strategies of the province, nor is it intended to address all issues related to the planning of water resources, such as aquatic ecosystem integrity, water quality management zones, riparian buffers, municipal land use planning, agricultural use and the integrated watershed management planning process and the secondary plans that compose it.

Much of the provincial response to concerns about water management, water quality, and water planning, (the broad context within which licensing and enforcement activities occur) pre-dates our investigation. As well, during the course of the investigation, the licensing and enforcement system itself has undergone significant changes.

The government has acknowledged concerns with drainage coordination and enforcement. In a document entitled Building a Sustainable Future, published in 2001, it was noted that "*... land drainage is not well coordinated amongst land owners, municipalities, conservation districts, and the provincial government. Drainage needs vary across the province but drainage enforcement is generally the major issue for the potholed region in the Assiniboine basin, while reconstruction and maintenance of drainage infrastructure tend to be the dominant issues in the Red River, Lake Winnipeg, and Lake Manitoba basins*".

The government also noted that "*The drainage system has deteriorated over the years and resources are declining to the point where many municipalities are requesting increased provincial assistance*".

The response, set out in Building a Sustainable Future, notes that "*Manitoba Conservation has also been working with Manitoba Agriculture and Food, Manitoba Intergovernmental Affairs, and landowners to develop and enforce a coordinated approach to drainage across the province. The province is committed to working toward resolving drainage issues, and as such, has re-established regional water managers and deployed water resource officers in the region so that drainage issues can be dealt with on the landscape*".

As part of the provincial "drainage strategy", the government indicated that it would "... *develop and implement a clear, coordinated approach amongst local organizations, municipal governments, and provincial government departments*". Part of that strategy also included a commitment to "*seek methods to streamline the approval process and improve enforcement*".

Since April 2003, Manitoba has also had an official Water Strategy that identifies relevant government policy and planning goals. Under a section entitled Actions for Tomorrow the government sets out goals (relevant to this investigation) that include:

- *Develop drainage plans locally, within the context of the watershed, which consider watershed rehabilitation, potential impacts, wetland conservation and fish habitat.*
- *Incorporate drainage as part of watershed planning in new water legislation proposals.*
- *Seek methods to streamline the approval process and improve enforcement of drainage requirements.*

Each of these goals and the actions taken to date to achieve them has had, or has the potential to have, an impact on the ultimate configuration of the licensing and enforcement system.

Work on the first two of these goals is currently underway. Questions relevant to this review are the length of time it will take to implement a system for managing drainage as part of watershed planning, and the specific licensing model that will result.

The third goal, streamlining the licensing process and improving enforcement, is useful as a measurement for evaluating the department's recent restructuring and current plans to use significant new resources provided by government.

Two other important aspects of the government's response to water issues, both specifically related to licensing and enforcement, were identified in the course of our investigation.

The first was a government attempt to address licensing concerns by partnering with a conservation district in a "pilot project" in which the district has a direct role in assessing licence applications. Although this six year partnership has faltered on occasion, it nevertheless remains a workable licensing model from which valuable lessons may be learned, and which can be used to assess the department's current plans.

The importance of this pilot project is magnified in light of recent government policies, published during the course of our investigation, that appear to call for a greater role for conservation districts in drainage licensing as part of overall watershed planning and management.

A second important development was the government's 2005 acknowledgment of the relationship between drainage and water quality, identified by the Lake Winnipeg Stewardship Board, and its proposed action to address water quality concerns arising from drainage.

The Lake Winnipeg Stewardship Board has recommended that:

> *"The process of obtaining a permit for tile drainage should be reviewed with the aim of ensuring that water quality and water quantity issues are considered".*

In a February 18, 2005 news release, responding to the interim report of the Lake Winnipeg Stewardship Board, Manitoba Water Stewardship committed to ..."*move immediately on this recommendation by ensuring that a water quality impact assessment will be included in all licensing decisions. We will also begin to plan and develop ways of undertaking environmentally-friendly drainage...*" (Manitoba Government News Release, February 18, 2005).

Because this commitment impacts the drainage licensing process, we have included it in this report and examined the government's efforts to give effect to its commitment.

Both the Land Drainage Review and Building a Sustainable Future indicate that the department has been aware of public concerns and complaints about both the drainage system and the licensing and enforcement within that system.

Manitoba's Water Strategy indicates the government's desire to address water issues in a comprehensive way and has set some goals to serve as a framework for implementation of this strategy. A number of significant changes have occurred to meet the goals of the Water Strategy. The Department of Water Stewardship was created to consolidate responsibility for water from programs across government to provide a better and more coordinated response in managing and protecting the resource. New legislation was passed that commits the government to move forward in a cooperative, sustainable and scientific manner to protect water from source to tap. The principles of watershed and basin based planning, and the ability to create regulations to support them, are established in *The Water Protection Act*. Lake Manitoba and Lake Winnipeg Stewardship boards have been established to consult publicly and present recommendations on activities, including drainage, that improve water quality, watershed rehabilitation, wetland conservation and agricultural land use practices.

It is within the context of the government's obligations under *The Water Rights Act,* and its broader water strategies, policies and commitments that appear to impact the drainage licensing and enforcement system, that we have examined the administrative system regulating drainage licensing and enforcement.

Finally, it must be noted that during this investigation the department has undergone a significant restructuring and received a substantial increase in the resources available for licensing and enforcement. As well, the department has undertaken a review of critical licensing and enforcement policies.

Within the necessarily broad context described, it is the specific changes to the licensing and enforcement system that we focus on in this review. We attempt to assess how these administrative changes address the legitimate concerns expressed by the public and acknowledged by government, and the extent to which they meet the requirements of current government policy.

LICENSING PROCESS

Upon receipt of a licence application by the department, and payment of the application fee, the application is supposed to go through an investigation process whereby the application is reviewed and a site inspection is done.

This departmental investigation could include consultation with the applicant and various nearby landowners, the relevant conservation district, and the municipality. A licensing officer would look at the landscape and determine if there was an adequate outlet for the water to be drained, ascertain what was to be drained, and assess the land type involved, i.e. natural wetlands, etc. The department's opinion and all data collected would be compiled into an impact assessment report which would then be circulated through the department as well as to the Departments of Highways, Conservation, federal Fisheries and Oceans, and any other government department or party that might be affected.

After this consultation process, a regional manager would recommend approval, and the licence itself would then be issued from Water Stewardship's Winnipeg office.

This is not a simple process. Because of the necessary involvement of many parties reflecting different interests and representing different jurisdictional perspectives, it is one with significant potential for delay.

LICENSING CONCERNS

Problems with the drainage licensing system have existed for many years. In 1999, a regional manager interviewed in the course of an individual complaint investigation described the licensing process as "awkward" and acknowledged that not all drainage projects are properly licensed.

From the perspective of the drainage licence applicants, accessing the system often proved to be a significant hurdle. The application form itself has been identified as an issue because many applicants were simply unable to provide the information required.

The most common public complaint about the licensing process is that it takes too long, and therefore the obvious solution would be to increase resources. However, our review indicates that while resources were inadequate, resolving the issue will require not just an increased staff complement but a different approach to licensing.

Other issues are the confusion about the department's ability to deal with a downstream landowner who withholds the approval required under the regulation for a drainage licence; and the inability to give effect to the government's commitment to address water quality issues when assessing licence applications.

APPLICATION FORM

The information required from applicants is prescribed by *The Water Rights Regulation* and summarized on pages fourteen and fifteen of this report.

Applicants are required to submit a sketch or drawing, and description, of the proposed water control works and outlet. If the body of water to be drained stretches beyond their land, they must show that all riparian owners on the shoreline of the water have approved the drainage. Equally important, is a requirement that if the water is to leave their land, they must show approval of the recipient. While this approval may sometimes be contentious, or unattainable, it is nevertheless a requirement of the regulatory system intended to protect landowners from the impacts of drainage. It is not a requirement that is hard for applicants to understand or, if downstream consent can be obtained, difficult to comply with.

However, the following information is also required by the Regulation:

- where any other existing or proposed works authorized under the Act are likely to be affected by the proposed drainage works, information showing any anticipated effects of the operation of the drainage works upon the effectiveness or operation of those other works;

- information showing any anticipated effects of the operation and the proposed drainage works upon irrigation or water supply generally and upon any future development for the purposes of irrigation or water supply generally;
- information showing any anticipated effects of the construction and operation of the proposed drainage works upon land within the watershed in which the proposed works are to be situated and upon the use of those lands and related resources and upon any other existing or future works in that watershed.

Obtaining adequate supporting information for applications has been an ongoing concern for the department. Senior departmental staff advised that the information required by Regulation, such as sketches and drawings, was frequently missing from applications, but licences were issued without all of the necessary information being submitted. At times the required information was quickly obtainable by staff, which avoided delays and criticism from applicants and eventually became the path of least resistance.

In a 2005 interview with regional staff, the practice of accepting deficient or incomplete licence applications was described as "in the past", but had been used to encourage applications rather than having people simply go ahead and break the law.

Another regional water manager interviewed in 2007, described the licence application form's main use as "contact" information. The form was "problematic and not user friendly" and while some applications were completed well, others were "just terrible". He expressed the view that far too much was expected of applicants when it came to the completion of the form, and he acknowledged that the department did not really provide any assistance when it came to its completion. He indicated however that when the application form was not filled out correctly or completely, it was not considered a "deal breaker" and that the information would be obtained one way or another.

Our investigation noted that the application form had changed over the years and we asked why certain questions, specifically intended to elicit information required by the Regulation had

been eliminated from the form. No formal policy decision appears to have supported or permitted this change, or at least none that was documented. We were offered the opinion that the questions were "a little wordy" and that the applicants were being asked for information that the department should collect and assess itself.

Line staff interviewed in 2007, noted the same deficiency with licence applications and estimated that as many as 50% of the applications received in that region were incomplete. After reviewing the relevant section of the Regulation, the staff person described it as confusing, and expressed doubt that many people submitting applications would easily understand it. However, the staff person clearly understood that it was the responsibility of the department to ensure that all of the information necessary to process the application was obtained and to determine where the drained water went together with any impact it would have.

The problem with the licence application form highlights what may be a significant flaw in the regulatory framework. It appears that the Regulation may require applicants to provide information that they do not possess and cannot easily obtain.

The department's practice appears to have shifted the responsibility for providing certain technical and other relevant data, from the applicant to the departmental staff responsible for processing the application. However, this significant shift to more staff responsibility should have triggered a re-evaluation of whether the department intended to assume that responsibility, and if so, a request to obtain the resources needed to meet that responsibility. Undertaking this workload within existing resources has likely been a contributing factor to both the licence turn around time and the growth of the existing backlog.

There is a strong argument that a change of this nature could only be made after an amendment to the Regulation. If the department were required to assemble the technical information required in support of a licence application, then that should have been communicated to prospective applicants. This in turn may have removed what has been described as an

impediment to those wishing to comply with the Act by making an application for a licence before draining.

In response to our inquiries about this apparent shift in responsibility, the department agreed that there is a discrepancy between the written policy and the practice. Applicants are supposed to supply the necessary information; yet the department currently undertakes to assist within its limited resources.

In response to this concern the Department advised:

> *"...it is the responsibility of the private landowner or project proponent to complete the application and to assess the impacts of their proposed project. It is the Department's responsibility to set the requirements of the application and assessment process, and to review the application and assessment submitted to ensure it is accurate and adequate.*
>
> *The Department is currently entering a phase of increased enforcement, and as such will be making an effort over the next year or longer to clarify the application and assessment requirements, and to educate landowners and project proponents as to those requirements. During this time, the Department will continue to assist project proponents with their license applications on a case-by-case basis when necessary and as time allows.*
>
> *.. the Department is identifying areas of concern where changes may be needed in the level of detail and type of information required. Where the Department feels a change would significantly alter the process and impact an industry, consultation would likely be required to ensure that there is a reasonable amount of public support for the change, and further that the change is implemented effectively".*

Recommendation:

That the Department clarify how technical information required of drainage licence applicants will be obtained and who will be responsible for the cost of obtaining that information; and that this be included in a policy available to applicants.

TIME FRAMES

The department's inability to process licence applications in a timely manner is a source of much frustration among stakeholders. Delays in licensing have been cited as a cause for widespread disregard for the licensing requirements. One conservation district advised us that:

> *"A lot of illegal drainage is as a result of long delays in getting licences. Farmers don't want to wait two years for a licence. Water sitting on land results in loss of income".*

Another district described the issue this way:

> *"The turnaround time for the issuing of licences/permits needs to be drastically improved. When a landowner has a drainage problem and requires a licence he is faced with long delays despite the fact that the need is timely and urgent. This leads to situations where a landowner takes immediate action to remedy the problem and then applies for a licence after the fact."*

Evidence of the actual turnaround time is largely anecdotal. Turnaround time is driven in part by circumstances beyond the department's control, including application volume and by the response time of third parties who are required or permitted to respond to applications. One region that attempted to measure turnaround time suggested that an average would be about four months.

Departmental staff have offered divergent views on the reasons for delay and on how to resolve the problem. One regional water manager expressed the view that with all the work that needs to be done to issue a licence, a practical turnaround time would be anywhere from four to six months, but it could just as easily be nine to twelve months. These time frames assume adequate and experienced staff. Other staff have suggested that the overriding issue has been the lack of staff available to assess the applications.

Under the current licensing system it is not always possible to approve drainage licence applications within the time frames demanded or required by applicants. Evidence suggests that there are circumstances where no licensing system can respond quickly enough while still regulating drainage impacts on the environment and on downstream interests. However, it appears to be the common belief that licence application approvals can be done more quickly.

While the time it takes to license a drainage project has been a source of complaints and contention, our investigation suggests that there needs to be a balance between meeting demand and remaining true to the intent of the statute. The administrative framework must meet the requirements of the Regulation, and protect the sometimes competing interests of agriculture, conservation, and environmental protection.

Approval times can be reduced if there is sufficient staff available with the necessary technical training, access to the necessary information (such as current and historical information about natural and constructed drainage works), an administrative system for tracking work on applications and complaints, and if contact with applicants is maintained.

Accessing local knowledge and dealing with applications on site to identify downstream and cumulative impacts can reduce approval times and have the additional benefit of reducing conflict among landowners.

Making applicants and staff aware of all the licensing requirements of the Regulation, and the important and necessary purposes behind those requirements, can reduce applicant frustration and shift the focus from time frames to efforts designed to obtain the information necessary to determine the merits of an application.

In discussions with the department they have acknowledged that there is a requirement to process licences and enforce in a timely manner, while ensuring a proper analysis of the proposed water control works, or the unauthorized drainage.

The department stated that to effectively administer *The Water Rights Act*, a timely licensing process requires regional staff to perform a site investigation, provide engineering and impact assessments of planned drainage works and issue a licence which reflects jurisdictional input, environmental protection and downstream landowner protection conditions. Drainage applications are often comprehensive, as the proposed works may have impacts in multiple jurisdictions. Landowner complaints of alleged illegal drainage are given a higher priority than licence applications and follow a similar process to licensing, resulting in the issuance of a licence or enforcement order.

According to the department, the backlog resulted from the predominance of the wet cycle, increased public awareness of the requirements of *The Water Rights Act* and the inability to immediately "staff up" to meet the increasing demand for licensing and enforcement. To verify the extent of the current wet cycle, the department has completed an analysis of eleven watersheds and data from climatological stations in the agricultural regions of the province. Two ten year periods were examined, namely 1988-1997 and 1998-2007. The analysis showed that the frequency of summer flooding events in the last decade was more than double that of the previous decade.

Applications are classified by the department as in progress, pending approval subject to installation of works by a third party in the watershed, or applications that likely will not be licensed because impacts cannot be mitigated. The department states that applications in progress were normally approved in a four month time frame subject to the availability of the landowner, completeness of the application information and the nature of the downstream impacts. Applications that are pending third party action can have substantial delays in licensing. Protracted negotiations and technical input which utilize significant government resources may be necessary. Applications that have substantial impacts also have substantial delays in reaching a non-licensing conclusion. Considerable resources have been utilized to address these applications.

The department anticipates that once the restructured and enhanced Water Control Works and Drainage Licensing section is fully staffed and the backlog is dealt with, a service standard will be set that will achieve a three month issuance period from the date of application for 90% of applications.

It also anticipates that with the reorganization, the application backlog will be addressed in a four year period.

While the department's general plan to set service standards and address the backlog within a specific time frame is commendable, questions remain about whether their current approach addresses some of the concerns identified by the public and by staff as weaknesses in the department's process.

Technical Information

It is common ground that when assessing licence applications, staff must have the appropriate technical training and expertise, as well as access to the necessary information such as current and historical information about natural and constructed drainage works.

A senior departmental staff interviewed in 2007, expressed the view that ensuring proper impact assessments was still a significant concern in the licensing process and that such assessments required adequate staff with technical expertise. He expressed the opinion that a proper impact assessment is not possible at a speed which would allow licences to be issued in a shorter time.

He agreed that each licence needs a site inspection, including both where the works are planned, and the area where the water is being diverted, upstream and downstream. He also indicated that the survey information must be assessed, if it is available, and in cases where it needs to be obtained this adds extra time to the application process. He indicated that the final analysis should come from someone with engineering credentials.

If this view is correct, then the department has taken a step backward with the loss of its most experienced people following the most recent re-organization. However, in response to this assertion the department has stated that:

> *"Unless the proposal is unusually complex, historically staff with strong land management backgrounds, and knowledge of hydrology and hydraulics, including Civil Engineering Technologists are quite capable of the analysis. Engineering input is still readily available in the department from the Water Control and Systems Management Section".*

The department agrees that modernization of its geographic information systems (GIS) is required to shorten the analysis time. This has been recognized and we were informed that equipment for field use by officers has been partially acquired and an additional staff position has been created for a GIS technologist to service the section. The department advised that a review is currently underway to assess future GIS technological and staff requirements for the section and department. The department intends to scan all physical water course maps and drainage plans over the last two years, so they may be accessed electronically by regional staff to contribute to the efficiency of an assessment.

If the department's assertion about the use of technologists and engineers from other branches is correct, it will either have, or have access to, the necessary expertise to assess the technical merit of a proposed drainage works. The assessment of future GIS and technological staff requirements, and the move to make recent water course maps and drainage plans available electronically, should improve the department's technical capacity. The department advised that:

> *A Geographic Information System (GIS) is a tool for bringing large, complicated data sets together in a way that makes it easier to visualize and correlate. It's a tool that can make the assessment easier to do. Neither satellite imagery nor GIS on their own, can predict cumulative impacts, hydraulic or otherwise. The Department recognizes that*

GIS is a valuable tool, we have been using it in some regions for a long time and we intend to expand its use in the future but we do not pretend that GIS on its own is a simple solution to the complex challenges of cumulative impacts assessment.

Our review suggests that knowledge of the local landscape and existing waterways is equally important when assessing applications. Concern about the need to have staff with knowledge of existing drains was raised by numerous conservation districts. Their criticism was that licences were being issued in isolation, without proper consideration of the cumulative impacts of projects, both licensed and unlicensed.

When asked to identify the specific issues affecting the licensing and enforcement process, we were told that in one region there was an absence of expertise in water, and generally the focus had been on flooding and not on drainage. Concern was expressed that the problem would get worse as experienced staff retired and this would deplete the knowledge base or background that was necessary to assist in dealing with complaints.

We subsequently raised the issue of knowledge of existing waterways with staff of the region in question. We asked how the department keeps track of existing water patterns and changes. We were advised that watershed maps showed designated drains but it was acknowledged that staff do not necessarily have any current and technologically appropriate method of determining the overall flow of any particular body of water: where it comes from, where it goes, how much water is added to it, and if it is changing.

Staff also confirmed that the region did not have a complete picture of the cumulative impact of drainage, largely because of the fact they have no way of knowing what has taken place historically. The assessment of applications was done on a "stand alone basis".

A staff person responsible for completing impact assessments, advised that in his view in order to do "a really good job" you would need to know the location of all roadways and infrastructures, the carrying capacity, slopes, storage capacity, and directions of all of the water bodies in that region. He confirmed that there is no comprehensive system by which they can

currently assess these components. We discussed satellite imagery and were advised that it would have to be purchased but there are no funds available for this in their budget.

This information confirms that the department lacks a key tool in assessing the impact of proposed drainage works for which licence applications are made. This lack of necessary information, or the resources to obtain the information, is a significant flaw in the licensing process. That flaw can be overcome by combining the technological advances described above with the use of local knowledge about existing drainage patterns, and by identifying potential problems with new water control works before they are completed and give rise to complaints.

DOWNSTREAM OWNER APPROVAL PRE-CONDITION

Another concern with the process is that the water licensing regulation effectively provides downstream landowners with a "veto" over drainage projects with which they may disagree.

As agriculture changes, land that was once economically unproductive, may become productive and agricultural producers seek to expand their operations through draining such land. The right of an individual landowner to refuse drainage onto or through their property can prevent upstream landowners from draining water that affects existing cropland or impedes expanded production.

In these situations, applications cannot be approved. This has been a source of frustration for landowners and staff alike, sometimes resulting in unlicensed drainage, landowner conflict and demands for enforcement.

In some circumstances, it may be that the proposed drainage project is appropriate and should not be held up because of the lack of approval from a downstream owner. There does not appear to be legislative authority to deal with these impasses. However, the department advised that when a downstream landowner is adversely affected by a drainage project, it would be tantamount to expropriation to compel him or her to accept the unwanted water. The department stated that it is generally accepted that expropriation, even with

compensation, should be limited to initiatives with demonstrable public benefits, and not used to enable private benefit.

However, the department further stated that a mechanism exists to allow a drainage project which has substantial net public benefits. The government would become involved through its enhancing the capacity of the receiving provincial waterway system so that objecting landowners would not be adversely affected. If other private land is necessary to achieve this enhanced capacity, expropriation with compensation could proceed.

Because this did not appear to be a solution to the problems that may be created by the Regulation, we inquired further with the department and were advised that the mechanism being referred to, expropriating lands for necessary projects, related to publicly initiated projects but did not apply to disputes between private landowners.

The department also advised that under the current licensing system, licences can be issued if the department determines that the objections of the downstream landowner are not founded. If that assertion is correct, then it is not necessary to make a recommendation to create such a mechanism.

However, during the investigation we were told that if a landowner who did not wish to receive water drained from another property withheld consent, then the application would be stalled. This appears to be consistent with the Act and Regulation, which provide that while the Minister may issue a licence, she or he may only do so after the applicant has met the specific requirements of the Act and Regulation, including approval by a downstream recipient of drained water.

Subsections 4(1) and 4(2) of the Regulation require that an applicant provide, among other things, approval of a downstream recipient:

> *"**4(1)** An application for a licence or permit under the Act shall include all plans, documents, information and particulars specified in the applicable application form.*

4(2) In the case of an application for a licence to construct drainage works, the application shall be accompanied by:

(c) where the body of water proposed to be drained lies in whole or in part upon land not owned by the applicant, evidence that all riparian owners along the shoreline of the body of water have approved the proposed drainage works;

(d) where the water proposed to be drained will leave the applicant's land, evidence showing the approval of the recipient of the drained water; "

In light of the department's position, I asked for clarification of the authority that supports its assertion that a licence may be issued in spite of a water recipient withholding approval.

The department advises that:

"Subsection 4(2) (d) of The Water Rights Regulation, as it is applied, does not give the downstream landowner "veto" power. The ability of the applicant to obtain the downstream landowners approval merely serves to simplify the impact assessment. One of the purposes of The Water Rights Act is to protect other landowners that might be impacted by a project. If those potentially impacted landowners do not have any concerns with the project, it simplifies the assessment. Downstream landowner approval is not a licensing prerequisite. Securing downstream landowner approval does not guarantee the license will be granted either.

Subsection 4(2) of The Water Rights Regulation sets out what documents and information are required to be filed with a license application to enable its consideration. Clause (d) was not intended to impose a substantive requirement for the approval of other landowners. Rather, it was intended to require the provision of evidence of that approval of affected landowners as a procedural requirement, if that evidence is available.

In practice, the current license application asks for "evidence of approval of affected landowners". The affected landowner may be downstream or upstream depending on the nature of the project. It is the Water Resource Officers' job to determine if anyone downstream or upstream of the project who opposes the project on the grounds that they are negatively affected, has a valid complaint. If that person's property is truly negatively impacted, the licence would normally be denied as the landowner has a right to be protected from the negative impacts of works on someone else's property. If the opposition is found to be frivolous, the license would normally be approved (unless there was another reason for it not to be)".

It is the responsibility of the project proponent to show that their proposed project does not negatively impact another landowner, and if it does, that they have taken steps to secure the approval of that landowner.

While the Department concedes the procedural aspect of the regulation may need to be clarified, we believe the existing mechanisms described above are practical and workable and serve their intended purpose. The Department will consider revising the wording of the Regulation with a view to clarifying its intent.

In light of the department's position a recommendation is not necessary at this time, however, I agree that the regulation needs to be revised and clarified.

WATER QUALITY

The department has acknowledged the importance of the environmental impact of drainage and, in 2005, made a commitment to include water quality impact assessments in all licensing decisions. We were told by departmental staff that in mid-2005, a process was initiated to look at drainage from a water quality perspective. Applications were sent to water quality staff who would do an assessment and provide feedback to the region. Decisions would then be made regarding the licence.

However, because of the volume of applications, the process was put "on hold" with 300 licence applications waiting for comment.

As an alternative, the Water Quality Management Section has issued "*...recommendations that should apply to drainage works during the approval process under The Water Rights Act*".

Those recommendations start by stating that "*There must be no net increase in nutrients (nitrogen and phosphorus) to waterways as a result of drainage activities*". While the balance of the recommendations identify some ways of reducing nutrient loading, such as erosion control methods, there does not appear to be any ongoing requirement to complete the "water quality impact assessment(s) " initiated by the government over thirty-three months ago.

We were also advised that the department has not yet been able to complete the manual for environmentally friendly drainage intended to give effect to the government's April 2007 commitment to "*...plan and develop ways of undertaking environmentally friendly drainage*". Although we had been told that funding for an environmentally friendly drainage manual had been approved in 2007, the department advised in February 2008 that work on this project would begin in the new fiscal year and would be completed in 2008.

The department has recently confirmed that licences issued under the Act do not require water quality review. The department asserts however that this does not mean that licence assessments are inadequate. They advise that there is existing policy to consider if a project will have an impact on soil erosion. To date the consideration of assessing projects in relation to the nutrients in the water to be drained is still under development.

There appears to be an acknowledgement that determining the impact of drainage projects is necessary. However, the process by which the department was to conduct a water quality assessment on licence applications has been replaced with general recommendations that impose requirements for which, on an individual application basis, there is currently no practical measure.

Our investigation confirms that this is a complex issue that cannot be easily or quickly resolved. However, given the concern about water quality and the relation of drainage to that issue, the government should prioritize the development and delivery of a public education plan in respect of environmentally friendly drainage licensing, and improvements to the drainage licensing and enforcement system.

Recommendation:

That the department complete and publish its proposed "environmentally friendly" drainage manual as a priority.

ENFORCEMENT

ENFORCEMENT PRACTICES

The department's long standing enforcement practices have been described by staff as follows:

> *"Historically, if a person or municipality performed illegal drainage works a drainage officer would investigate, and if a violation of The Water Rights Act had occurred a letter notifying the landowner or proponent of the work would be sent informing them of their violation. The letter would outline the actions required to mitigate the problem, be it closing in the works, modifying them to some degree, or altering the project entirely. The offender would then have a certain amount of time to comply with the letter. In some cases compliance was undertaken quickly, often as a result of the offender not being aware a licence was required, etc. In some cases, offenders undertook the remedial work reluctantly due to misinformation (meaning they were told no approval was required by an alternate party).*
>
> *In most other cases the offender does not comply with the letter from Water Stewardship, and harsher methods are required. The next step in this process is the issuing of a ministerial order ... ordering the offending party to modify the illegal drainage works to the conditions outlined in the order in the required amount of time. If the offender does not comply the province can get a third party to undertake the required work and all costs incurred are the responsibility of the offender to pay."*

While this is a description of the process as it was intended to work, information from stakeholders suggests that the process in place for many years was more convoluted and less effective. Problems identified included the failure to bring the necessary technical expertise and information to enforcement activities; the inadequacy of current enforcement powers; an apparent ambivalence toward enforcement; and a system where staff performed competing advisory and licensing and enforcement functions simultaneously.

TECHNICAL PROFICIENCY

As with licensing, the training and expertise of staff and their limited access to necessary technical information has been a significant impediment to the department's enforcement efforts. It has also been a frequent complaint by individuals who assert that the department has not responded appropriately to their complaints.

The issue of staff expertise in water management and their access to geomatic information has become an issue when departmental staff have been unable to submit persuasive evidence at hearings where ministerial enforcement orders were appealed to the Municipal Board.

In one such case in 2005, the Municipal Board commented on conflicting evidence between departmental staff and a landowner:

> *"[staff name] claims [staff] has seen that there is a negative impact. [staff] came to this conclusion when [staff] was at the Spring 2003 meeting when [complainant] appeared to make his complaint. [staff] says that [complainant] showed [staff] the area where surface water was pooling, and what [staff] saw was alfalfa surrounding the affected area but not where the water pools.*
>
> *[Appellant] disputes the assertion that the pooling of surface water is a problem of any kind. He says that he and his brother farmed that land together for more than 20 years, and in his experience there never was any flooding left in the area by the time it came for seeding. He says that through the entire time he farmed the land, there never was a time when they could not work in the area.*
>
> *[Staff name] admits that [staff] is not a forage expert and [staff] therefore does not know how long surface water needs to sit in an area to kill alfalfa. [staff] also admits that, if the crop in the affected area were a water tolerant grass, [staff] likely would not have concluded that harm is being caused.*

The evidence before the board on this point amounts to conflicting testimony between [staff name] and [appellant]. [Appellant] is speaking from his own personal experiences, while [staff name] observations are based on the few times [staff] saw the lands. No doubt, [staff name] has reached [staff's] conclusions honestly and in good faith. However, the board has no reason to disbelieve [appellant's] testimony on this point. He speaks from his own direct personal experiences, and the board accepts his version of events.

Moreover, [appellant] has produced photographs showing that by April 15 of this year, 2005, all spring runoff had already drained away from the affected area. The department's photographs are from the previous year, on April 5 of 2004, and they show only that water was pooled in the area on that date. They do not establish the date when the pooling was gone."

The Board found that the position of the department had "*not been established*".

In a 2006 decision, the board offered broader comments on the department's obligation to present evidence and the quality of the evidence before it. The Municipal Board said:

"On the whole, the evidence presented by Water Stewardship does not fully establish that these are not natural channels, nor does it fully establish that the amount of work done is beyond the level of minor work (i.e. more than 12 inches of soil).

The evidence presented by Water Stewardship consists of a history of aerial photographs, together with the observations and recollections of one departmental official, [staff name], who actually attended the site. While [staff name] has expressed an opinion that these are non-natural watercourses, and that their depth is more than 12 inches, he has brought only minimal amounts of objective information that can help us verify the accuracy of his opinions.

> *Of the various photographs that have been presented as evidence, they are almost all aerial photographs. Few photographs have been taken from the ground regarding the specific channels where work is being required under the order. Moreover, there are no results of professional surveys of the elevations in and around the channels, no results of informal measurements that might have been taken by [staff name] while he was in the field, and no records or notes of his observations during those field trips.*
>
> *In our view, where an owner or an appellant challenges Water Stewardship with respect to its conclusions and opinions reached in issuing a ministerial order, Water Stewardship should be prepared to present a cogent evidentiary basis to defend its orders – especially where the owners or appellants take a contrary position. For example, if Water Stewardship is arguing that work exceeds 12 inches in depth, there should at least be some evidence that can objectively verify that assertion."*

This critical enforcement issue has been recognized by the senior departmental official who initially spoke about the loss of water expertise as experienced staff retires. In order to address this issue properly, the department must find a way to combine technical expertise with reliable knowledge of existing water courses.

Adequacy of Enforcement Powers

There appears to have been consensus for some time that the department's enforcement powers needed to be strengthened. The problems of inadequate staff resources and a lack of water expertise were compounded by the fact that the enforcement measures available were so limited as to have been of little use to the department. Fines were rarely imposed, but if imposed, were viewed as part of the cost of doing business. Ministerial orders could be circumvented by initiating an appeal process that could last years and result in a hearing in which departmental staff were unable to mount persuasive evidence.

The department has acknowledged that *"Past discretionary fine levels have been too low to act as a deterrent"*. It has also noted that:

> *"Up to this point in time, the most effective enforcement tool is the ministerial order which can order a landowner to decommission or alter an illegal drainage work. In the past 3 years virtually every ministerial order issued in Manitoba (approximately thirty) has been appealed to the Municipal board. Amendments to the Act were passed that remove the stay of works pending appeal to a ministerial order thus strengthening it as an enforcement tool."*

There does not however appear to have been any easy consensus on how best to strengthen the department's enforcement capacity.

However, improvements have been made. With the passage of *The Water Rights Amendment Act*, the Minister can appoint officers with the power to enter upon lands without a warrant to inspect the land and any works. Regional staff now have the power to issue common offence notices (tickets) although they do not have the power to issue remedial orders, which still must come from regional headquarters. Orders can still be appealed to the municipal board, but such an appeal will no longer act as a stay of the order. Enforcement is now the responsibility of a single office. In addition to the new staff who will have responsibility for enforcement, along with their licensing and other duties, the department has added a new executive position, Director of Regulatory Services, to provide management in this area.

Despite these commendable steps forward, many concerns remain. The department has acknowledged that while the passage of *The Water Rights Amendment Act* and enhanced staff training will improve enforcement, the effectiveness of these changes will be limited by the level of staffing available to enforce the Act. It has noted that:

> *"Staff time required to adequately address enforcement issues is very difficult to estimate and predict. In many cases, a single complaint can result in meetings, surveys, hydraulic analysis and significant time spent negotiating and mediating between parties."*

Although field staff now have the power to issue tickets, the department had been trying since 2005 to secure amendments to *The Summary Convictions Act* to establish set fines. The Offence Notice Regulation was amended in March 2008 to introduce set fines.

Concerns remain about the adequacy of the current fines. The department considered and rejected stronger measures such as the power to seize equipment used in the construction of unlicensed drainage works. We understand that there are divergent views on these matters resulting from the tension between water rights enforcement and the requirements of the agricultural community. The enhanced enforcement amendments were described by staff as a compromise that everyone could live with.

Although we were told that there is also a concern about the staff's inability to issue common offence notices to other levels of government or bodies having jurisdiction, the department has advised that "*Municipalities and CDs are subject to licensing requirements of the Act and are served in the same manner if they are in contravention.* "During the course of the investigation we had an opportunity to revisit the issue of the department's enforcement powers after the amendments. In 2007, staff still felt that enforcement in general needed to be substantially improved and that the limiting factor is the availability of qualified trained personnel.

When asked for suggestions on how to improve the system, staff suggested a "substantial increase" in fines and provisions that would allow seizure of equipment in order to stop illegal drainage. Enforcement staff stated that imposing fines was a step in the right direction but the fines should be much stiffer as some of the larger landowners would be content to pay the fine as opposed to having to stop the illegal drainage. This was remarkably similar to a view we heard from others and in particular from conservation districts. One district told us that:

> *"Large landowners would willingly pay the fine for unlicensed drainage works and view the penalty as simply the cost of doing business".*

Another district noted that fines are not as effective as orders requiring ditches to be filled in. It was suggested that a farmer would pay a fine, and the unlicensed work would typically remain,

with the fine being seen as a licensing fee.

One staff member interviewed in 2007 suggested that the government remains reluctant to prosecute municipalities or to be the "heavy" with landowners. He expressed the view that the department still did not have a strategy on enforcement and that issues need to be better addressed in policies and procedures.

A 1988 departmental policy on enforcement remains in effect despite the department's efforts to revise it. We received a draft of a proposed new policy in April 2007, but were later advised in November that the new policies had not yet been implemented.

Recommendation:

That the department develop a policy, to be consistently applied, to take enforcement action when illegal drainage is occurring.

That *The Water Rights Act* enforcement powers and penalty provisions be amended to be consistent with the offence and penalty sections of *The Water Protection Act.*

That the department review whether statutory authority should be provided to allow drainage officers to issue immediate stop work orders and orders requiring remedial action.

That the department review the adequacy of enforcement measures available to staff to determine if further powers are needed to stop unlicensed drainage.

Negotiating Compliance

Our investigation revealed that departmental staff have asked unlicensed drainers to apply for licences after the fact in the hope that licence conditions could then be imposed to mitigate downstream impact. In other instances, department staff have engaged in protracted "negotiations" aimed at compromise solutions that downstream landowners often found unacceptable. When negotiations failed, complainants were left to wonder why the law had not

protected them as it was intended. The most frustrating aspect of this process for complainants was the often lengthy time expended by departmental investigations while their land continued to be damaged by unlicensed drainage.

The lack of enforcement was an issue raised by numerous conservation districts. In 2007, one conservation district described the enforcement situation in this way:

> *"Enforcement of licensing often takes place on an "after the fact" basis. For example, Water Stewardship will come along and identify an unlicensed drain and say to the offender here, fill in the application and we will approve it. Landowners do what they want when they want despite the threat of possible consequences being leveled against them. They act with impunity because there is no enforcement being carried out."*

In response to criticism about licensing projects after the fact, where the work had already been done without a licence, the department commented that its enforcement approach to unauthorized works is not automatically punitive. If a work is licensable it will attempt to bring the individual into compliance. The department believes that education is an important tool to promote responsible drainage. It stated that *"if the work cannot be altered to be licensable, the work will be removed by request or order."*

The comments we heard about issuing a licence for a project after it had been constructed related most often to those projects where the rights of downstream owners may have been violated by the unlicensed works.

To deter flouting of the law, it may be more beneficial to apply the appropriate penalty for the breach and also to require compliance by way of a licence application to ensure that the project is in fact "licensable." This would help to address the concerns that the province is not enforcing the licensing requirements of the Act. By way of further clarification, the department advised that:

> *"Water Resource Officers will exercise a broader discretionary authority to issue either a warning or an offense notice (or ticket) upon identification of a first offence for unlicensed drainage, during the educational enforcement period. If a warning is issued and the unlicensed works are not reset or a license is not applied for within the time allowed, a ticket would be issued. Each day that an offense continues is considered a separate offence."*

A significant problem arising from the historical lack of enforcement is that the department will now be attempting to deal with licence applications, or complaints, that have been in existence for years. The department has acknowledged this difficulty and advised us that:

> *"Enforcement requires technical support, good negotiation skills and consistent implementation. Both parties, the complainant and the accused are interviewed to assess the facts. Enforcement is prioritized based on the level of the emergency, whether infrastructure or a crop is impacted. It is often difficult to come to an equitable solution for all parties. In many cases, compliance or resolution to the satisfaction of either party is not achieved or accomplished in a short timeframe. For illegal works that have been in place many years it is difficult to restore to the state of nature as there are no topographic records and subsequent works have been constructed."*

The notion that the intent of enforcement is to come to "...some kind of equitable solution for all parties" is not consistent with the regulatory framework that prohibits drainage of water from one landowner onto another without a licence, for which a prerequisite is the consent of the recipient.

Unfortunately at this point the department is faced with an historical gap in enforcement and therefore its position is that:

> *"Where there is no way of proving one way or another what the land looked like before the work was undertaken, and it appears that the works are licensable, the Department's best option is to require the landowner to get a license and to work with*

other impacted landowners to negotiate the most optimal terms and conditions for that license".

SEPARATION OF FUNCTIONS – REGULATORY V. ADVISORY

Historically, the enforcement efforts of regional water staff have been impeded by their attempting to perform two roles: one as a provincial liaison with conservation districts, municipalities and individuals wanting to undertake drainage works, and the other acting as regulatory officers.

This raises a fundamental question about whether there should be a separation between the advisory function of the department which provides assistance in planning, technical analysis, and coordination of possibly divergent interests for better water management; and the licensing and enforcement function which relates to the investigation and compliance activities related to individuals to whom licences have been issued with conditions attached, or who are acting contrary to the law.

The issue of conflicting roles was raised with senior policy staff in the department, who at the time acknowledged that this was "a significant problem". It is a problem that does not appear to have been addressed during the current restructuring despite the department's receiving approval for additional staffing.

The department views the functions of licensing and enforcement as integrally related and not inherently in conflict. However, the department agrees that a conflict arises as a practical matter through the additional counseling and support provided to drainage licence applicants in the preparation of their applications. In such cases, it may appear that a licence application on the terms sought would be difficult to withhold even if an unforeseen impact results. It acknowledged that if the department were to determine that support should be provided to applicants to develop the information necessary to assess their applications, then that support function should be separated from licensing and enforcement functions.

This additional support includes the work described by staff who expressed concerns about conflicting responsibilities, particularly in relation to drainage projects initiated by municipalities and conservation districts. Providing advice and support to a proponent of a drainage project places the departmental official in a conflict when there is a complaint about that project.

However on a day to day basis, support to prospective applicants has been provided by those responsible for investigating complaints; regional water managers and their staff. With the increase in staff resources, the department has redefined the position of "water resources officer", the line staff position responsible for both licensing and enforcement. The position duties and responsibilities for a water resources officer, identified in the position description include:

- reviewing water control works licence applications from the time the application is received until the time the licence has been denied or issued;
- providing support for the water control licensing section that prepare technical reports, surveys, legal reviews;
- investigations for enforcement of the Act;
- providing public information regarding the Act and administration, licensing and enforcement of the Act;
- promoting Water Stewardship programs;
- liaising with local governments;
- assisting landowners in identifying land drainage options consistent with municipal and provincial objectives.

This new job description does not appear to resolve the inherent conflict, as it requires a water resources officer to provide advice and support on the one hand, and to act as an enforcement officer on the other.

In response to our ongoing inquiries in respect of the need to separate advisory and support functions, the department advised us in April 2008 that the two professional positions will be responsible for, among other things, the provision of technical support to conservation districts, municipalities, and private landowners, regarding the resolution of significant drainage issues that require engineering expertise. They will also be responsible for providing support to water planning authorities/CDs in the development of surface water management plans within integrated watershed management planning processes. These positions are in addition to the existing the staff complement. One of the positions has already been filled.

Recommendations:

That the department clearly distinguish between advisory and support functions, and the regulatory, or licensing and enforcement functions in policy and job descriptions.

That the department develop a clear public policy on enforcement and communicate it to municipalities, conservation districts and the general public.

ADMINISTRATIVE ISSUES

All administrative systems require policies to drive and guide the work done by staff as well as record keeping systems to facilitate and monitor that work. Neither of these requirements appears to have been put in place for drainage licensing and enforcement staff.

FILE MANAGEMENT

An effective file management system should facilitate the work of staff by creating a record of the chain of events as a matter progresses so that it can be followed and used to monitor progress and efficiency. Good file management can also serve as an invaluable communication aid in dealing with applicants or complainants inquiring about the status of their file.

Significant efforts were made during this investigation to analyze application and complaint files in regional water offices. The goal was to identify specific issues, gaps between policy goals, and implementation procedures that were contributing to the apparent breakdown of the licensing and enforcement system.

Specific indicators had been identified for both applications and complaints. In respect of applications, for example, we tried to determine if incomplete applications had been accepted, if assessment reports had been prepared and if evidence of the approval of downstream recipients existed. In respect of complaints, we were looking for evidence that these complaints had been acknowledged and investigated.

Teams of investigators went to regional offices to select and review licence application and complaint files randomly. Numerous files were reviewed, and a number of issues became apparent.

The first area of significant concern was that there was no single common file management system among the three regional offices. Each regional water manager appears to have developed his own record system and, in some cases, individual staff members had created their own working file system.

We found instances where files contained nothing other than an originating document, such as an application or a complaint. In discussions with staff however, we were told that the absence of documentation did not necessarily mean the required work had not been done, but simply that it may not all be on the same file.

In one region, when we asked for a computer printout of applications and complaints, we were advised that print outs were only available going back to 2002 for applications and that the region planned on putting information from previous years into the data base.

We were advised that complaints have only been recorded on the data base since 2006, but the region hoped to be able to go back as far as 1998 to "complete" the data base. At present, files are opened upon receipt of written complaints and are recorded in the data base. In previous years however, files were opened for written complaints but were not recorded anywhere else. No records are kept of telephone calls.

We inquired if there were other less formal mechanisms for recording complaints and applications, such as a log book. We were advised that the only other record kept related to the receipt of application fees for licences. Upon receipt of the applications, the money received is recorded manually in a log book and a copy of the application is then sent to head office, which has the responsibility for issuing licences.

In another region, we were advised that there is a typed log book for applications only. It is updated when administrative staff has time to do so and at the time of the interview it had not been updated for over three months. Applications are entered according to the municipality where the land is located. There was no formal system for documenting complaints.

In this same regional office, we found files containing little information beyond an initial application, but were advised that staff kept their own "working file". Working files appeared to be more complete.

In the third regional office, we found that complaints were filed by watershed number and by last name of the landowner being complained against, not the complainant. Multiple complaints are contained in the same file and separate files do not appear to be created for each complaint. There always seemed to be at least one contact between a departmental person and the complainant, a phone call or site visit indicating that there had been an acknowledgement of the complaint. There was no form letter or standardized process to respond to complainants. It appears to be done on a case by case basis. Applications were filed in a similar manner though separate files seemed to be created for each application.

In one office we attempted to examine forty-five randomly selected complaint files, however by the end of the first day we had only been able to locate 15 files. By the end of the second day we had located an additional five files. These five were filed separately from the others. There is a separate filing system based on the rural municipality in which the land is located. An RM file could have pieces of paper from a number of different complaints. It is not clear exactly why this other system was in use. In order to find information in this system, investigators had to examine every piece of paper in the file in the hopes of finding one pertaining to a particular complaint.

Deficiencies in the file management system for licensing and enforcement made it impossible to determine with any certainty the answers to critical questions such as the actual turn around time for licence applications or for dealing with complaints. The system also was unable to be used to identify common areas of concern that might be relevant in licensing decisions, such as tracking complaints that clearly indicated that an existing waterway was being used beyond its capacity and needed to be upgraded.

Recommendation:

That the department develop a provincial database that requires that all licence applications and complaints are recorded. The database needs to allow the tracking of applications and complaints from acceptance to conclusion. This database should include the necessary forms and a mechanism that permits management to monitor progress.

INADEQUATE POLICY

Policy is an essential administrative tool in the link between the decisions made by the legislature and the actions of public servants intended to give effect to those decisions. It can be used to clarify the intent of the legislature, serve as the basis for procedures that guide the specific actions of staff, and define the relationship between staff and the public affected by legislative decisions. For policy to work, it must be consistent with legislative goals, easily understood and implemented, and applied fairly so those in similar circumstances are treated in the same manner.

The department's drainage licensing and enforcement policies dating back to 1988 are inadequate. Efforts begun in 2006 to make the necessary changes have yet to be concluded.

An example of policy deficiency is the lack of any distinction between new water control works and the maintenance of existing drains. Disputes about the maintenance of existing drains, and whether they require a licence, is one of the problem areas identified by a senior staff person who felt the issue arose because *"under The Water Rights Act everything needs a licence"*.

There is a 1988 policy on licensing: Procedure Directive PR 08 14 002 "To establish a procedure for the licensing of drainage works under *The Water Rights Act W8"*. That directive states *"No licence shall be required for the maintenance or restoration of existing channels. However, a licence is required prior to restoration or reconstruction of existing channels when such work significantly increases the flow capacity of the channel"*.

As written, this policy provides no direction to staff and raises more questions than it answers. It appears to say that maintenance, reconstruction or restoration will only require a licence if it significantly increases the capacity of the existing channel.

It does not address changes to the direction of a channel and more significantly, it does not provide any definition of any of the critical terms used: restoration, reconstruction, maintenance or what is a "significant" increase in capacity.

As these definitions were not provided for in either the Act or the Regulation, they should have been addressed in policy. They were not.

In the absence of a clear policy, staff appear to have adopted the "12 inch rule, " (or the 8 inch rule or the 'no clay' rule as it was also known.) This was clearly an attempt to address the issue of maintenance versus new construction, and specifically to allow the clean out of existing drains without requiring a licence. We were also advised that this "informal" rule had been created as a means of dealing with licence application volumes because *"...there were hundreds of applications and only one person to process them".*

Initially the rule was that if a person was only cleaning out a drain and removing twelve inches of soil or less and did not touch clay, then no licence was required. It was suggested that, at times, the rule may have been broadened to include situations where soil was removed as far down as clay and, if the clay were not disturbed, it was not particularly important how much soil was removed.

A senior staff member acknowledged that both of these approaches were problematic. He acknowledged that it was difficult to assess how much soil was being removed and if someone went down to clay they could easily be removing 6 feet of soil. He explained that the rule evolved to an understanding that removing any amount of soil up to 12 inches was at the discretion of the regional water manager.

This issue was raised by a conservation district official who noted that *"There is no such thing as a 12 inch rule in this jurisdiction. Offenders will remove three feet or whatever they can get away with because Water Stewardship absolutely refuses to effect enforcement".*

The "12 inch rule" became an issue in a 2005 enforcement appeal when the municipal board struggled to deal with its inconsistent application. In decision D-05-005, at page 5, the board cited information from staff that the "12 inch rule" was departmental policy, stating that:

"The mandate given to the department under the Act therefore is very broad.

In undertaking its mandate, the department has established certain policies to guide itself. Based on the oral testimony of [staff name] and [staff name] the following are some of the policies that seem to have developed over time within the department:

- *In agricultural regions the department does not get involved with activities it considers to be minor. In this regard, it considers a removal of 12 inches of soil (but not clay) to be minor.*
- *When deciding whether to take enforcement action to issue a remedial order, the department will consider the impact of a water control work.*
- *The department typically will wait for a complaint before taking enforcement action. A complaint can be made orally and need not be reduced to writing."*

The board had difficulty reconciling the department's actions with its explanation of the unwritten policy, as evidenced by the following comments at page 12 of the decision:

"The department's 12-inch Policy

The department says that because of its depth, the new channel is not a matter of its concern. What is not entirely clear, however, is exactly how the department is applying its 12-inch policy in relation to this new channel and the existing ditch.

It is, of course, difficult to know the exact purpose and scope of any policy when it is unwritten. Nevertheless, the board's understanding of the 12-inch policy is that it allows the department to distinguish between those water control works for which a licence will be required and those for which one will not.

In this case, it seems that the department is using the 12-inch policy for reasons more than just deciding whether it will get involved in licensing a water control work. In this case, the department seems to have concluded that because the new channel is less than 12 inches deep, it is not a possible component of an alternative solution to the pooling problem.

> *However, the evidence offered by [witness] establishes that by simply widening the channel, and not making it any deeper, the entire pooling problem could be resolved by [witness] without ever getting the department involved. The department now seems to be using its 12-inch policy in a way that has to do with more than just deciding when it will get involved with the licensing of a work. It is using the policy in a way that it is ignoring an otherwise plausible and effective resolution to the problem."*

There is no doubt the 12 inch "rule" was well intentioned. Common sense dictates that there is a difference between creating new water control works and maintaining the operation of existing drains. However, replacing one rule authorized by law with another arbitrary rule, the authority for which is questionable, does not necessarily make it easier to monitor or assess the impact of the unlicensed work.

Once the test of legal compliance was changed from whether or not work had been done without a licence to whether or not the unlicensed work done was more than 12 inches deep, or had removed clay, assessment became more subjective and open to challenge or defiance. The entire system became more susceptible to abuse.

We were advised by some complainants that a common practice among unlicensed drainers was to complete works in late fall just prior to snowfall. After a winter of snowfall and a spring run-off, determining the size of an existing runway (water course) was difficult and in some cases impossible. One conservation district reported that it can be difficult to prove unlicensed drainage after it fills in with new growth.

Again, this appears to be a situation that required either an amendment to the Act or a clear policy statement that could have considered and addressed critical issues such as the definition of maintenance.

Had such an amendment or clear policy statement been developed it could then have been used to communicate effectively with landowners, municipalities and conservation districts to avoid confusion and conflict over what was permitted by law.

This licensing requirement is an issue identified by departmental staff and many conservation districts. It appears to be the source of some significant dispute among landowners. It is addressed in an existing policy statement that has proven to be inadequate. This has resulted in the staff attempting to find a way to address the problem by applying a "rule".

Recommendations:

That the Department consider an amendment to *The Water Rights Act* to create a distinction between the creation of new water control works and maintenance or minor works, and include a clear definition of "maintenance".

That the Department consider an amendment to *The Water Rights Regulation* to create an expedited application process when appropriate for licensing maintenance and minor works.

RESOURCE ISSUES

We have been advised by departmental staff at all levels that the lack of adequate resources has been an impediment to meeting the department's obligations with respect to licensing and enforcement. There seems to be no dispute that resources have been inadequate at least as far back as 1997. By 2005, senior management had acknowledged that *"Current resources are not sufficient to carry out the activities of the department"*.

During the investigation, the department increased its licensing and enforcement staff, and has obtained approval for additional licensing and enforcement staff. As well, the department has created a training program specifically designed for enforcement.

In examining the resource shortfalls we have identified issues in addition to the number of staff available for licensing and enforcement work. Issues identified by staff and other stakeholders include staff training and the availability of, or access to, the necessary engineering expertise and geomatic information.

STAFFING HISTORY AND RESPONSIBILITY

During the 1990s the Water Branch was a branch within the Department of Natural Resources.

In October 1999, the Department of Conservation was established. It consisted of the previous Departments of Natural Resources, Environment and the Petroleum and Energy component of the previous Department of Energy and Mines.

The integration process took some time to complete. Both the 1999/00 and 2000/01 annual reports noted that the integration was not complete. The 2001/02 Annual Report noted that the integration of the operations was completed. The report also noted that the integration process resulted in new boundaries for Regional Operations. A sixth region (Red River) was created which incorporated parts of the former Central (now Interlake), Eastern and Western Regions.

In November 2003, the Department of Water Stewardship was created. In forming this new department a number of programs were transferred from the Department of Conservation. These included the Water Branch, Regional Water Operations, Fisheries Branch, Regional Fisheries Operations, Office of Drinking Water and the Flood Proofing Program. The administration of other water related programs such as the Manitoba Water Services Board and the Conservation Districts Program were transferred from the Department of Intergovernmental Affairs to Water Stewardship. As result, the staff complement for Water Stewardship comprised of approximately 230 staff years and remained at this level for next few years. At March 31, 2006 Water Stewardship comprised the following departmental divisions, including the Manitoba Water Services Board.

Department of Water Stewardship	
Area	**Staff Years (rounded)**
Administration and Finance	16
Ecological Services	117
Infrastructure and Operations	75
Manitoba Water Services Board	27
Total	235

Infrastructure and Operations comprised the following branches:

Infrastructure and Operations	**Staff Years (rounded)**
Administration	5
Water Licensing	18
Water Control Infrastructure	10
Regional Water Operations	42
Total	75

As of March 31, 2006 Regional Water Operations Branch was responsible for the delivery of the programs related to provincial water control infrastructure and maintenance as well as drainage licensing and enforcement. Included in the staff complement were regional engineering and divisional infrastructure staff who maintain the water control infrastructure works and operated dams such as the Shellmouth Dam and flood control works such as the Red River Floodway and the Portage Diversion. Approximately thirty-two staff were responsible for the infrastructure and maintenance. The ten remaining staff are responsible for drainage licensing and enforcement.

In December 2006, responsibility for the water control infrastructure and maintenance activities was transferred to the recently created (September 2006) Department of Infrastructure and Transportation (Infrastructure and Transportation). This new department was created to consolidate the province's major transportation and water-related infrastructure projects. This resulted in the regional engineering and infrastructure staff being transferred from Water Stewardship to Infrastructure and Transportation. Activities pertaining to:

- engineering design of drainage bridges, crossings and water control structures
- input to multi-year capital planning
- new construction, rehabilitation and maintenance
- drainage related technical and survey support,
- construction, rehabilitation and maintenance of water control structures pertaining to water supply, regulation and flood control (including ring dikes)
- operation of water control structures for water supply and regulation
- operation of water control structures for flood control
- flood response
- technical support for drainage licensing and enforcement

became the responsibility of Infrastructure and Transportation.

Activities related to:

- multi-year capital planning and priority direction
- Regulation development
- flood response coordination
- drainage licensing and enforcement

remained with Water Stewardship.

Shortly after the transfers, Water Stewardship implemented a number of organizational changes, effective April 1, 2007. The changes included the conversion of the "Infrastructure and Operations Division" to the "Regulatory and Operational Services Division". The Water Control Works and Drainage Licensing Section was established under the new Division and included the regionally-based drainage licensing and enforcement staff.

We examined the various Annual Reports and summarized the drainage licensing activity in the table below:

Drainage Licensing Activity											
Department	**Natural Resources**			**Conservation**				**Water Stewardship**			**Total**
Fiscal year	**93/94 to 96/97 (4 yrs)**	**97/98**	**98/99**	**99/00**	**00/01**	**01/02**	**02/03**	**03/04**	**04/05**	**05/06**	
Applications received	109	131	240	280	440	535	535	415	421	518	3,624
Licences issued	63	17	69	143	70	302	302	298	230	188	1,682
Difference	46	114	171	137	370	233	233	117	191	330	1,942
Ministerial Orders pre-pared	9	19	6	20	12	14	14	4		12	110
Complaints received	99	60			540	564	79	56	179	196	1,773

We noted that Annual Reports prior to March 31, 1994 did not contain any information on drainage licence activity. However, other analysis prepared by the department provides an insight into the situation at that time, as follows:

> *"Very few drainage licences for private drainage works were issued prior to 1996 due to an extended drought period. Since the mid 1990's, Manitoba has experienced a very wet cycle, resulting in six major floods and unprecedented summer rainfall events that have escalated agricultural crop damages. To improve performance of the surface drainage system, municipalities and landowners responded by significantly increasing drainage work construction. These activities resulted in a corresponding exponential increase in landowner complaints and enforcement orders attributed to illegal drainage.*
>
> *In 1996, the department, then Manitoba Natural Resources, responded with a major reprioritization of staffing resources, resulting in the current compliment of ten regional staff".*

The above noted staff complement of ten continued for the next ten years. During that time period, as noted in the table above, the drainage licensing activity increased significantly. The staff resources provided for drainage activities however, did not increase in response to the increases that were occurring. Missing from the information was an evaluation of the differences between the licence applications received and the licences issued. Intuitively this would have been applications denied or applications still in process. Missing too was the cumulative status of licence applications over time. Also missing was the cumulative status of other licensing activity such as complaint investigations, drainage project compliance inspections and enforcement activity.

In the 2006/07 budget review, Water Stewardship identified that the current resources were not sufficient to carry out the drainage related activities and requested additional staff and funding for the program.

On April 18, 2007, the Minister of Water Stewardship announced the addition of 14 water resource officers to the program. The department has advised us that:

> *"It is anticipated that once the restructured and enhanced Water Control Works and Drainage Licensing section is fully staffed and the backlog is dealt with, a service standard will be set that will achieve a 3 month issuance period from the date of application for 90% of applications.*
>
> *It is anticipated with the reorganization that the application backlog will be addressed in a 4 year period."*

The staff complement for the program now totals 24 and comprises the following: (current to April 16, 2008)

Department of Water Stewardship **Water Control Works & Drainage Licensing Program Staff Complement**			
Position	**Staff Complement**	**Filled**	**Vacant**
Manager	1	1	0
Senior Water Resource Officer	2	2	0
Water Resource Officer	18	18	0
GIS Operator	2	2	0
Special Projects Officer	1	0	1
Total	24	23	1

The current provincial response however does not include any concrete plan that would address the existing backlog. As of September 2007 the backlog of "licensing and enforcement case work" was 702 files. The backlog of existing licences requiring compliance inspections had risen to 1493.

In October 2007, we inquired if there were a specific plan to deal with the backlog as distinct from ongoing case work. We were told that once the new staff were hired and trained, in 2008,

the new water service officers would be assigned a mixed case load of enforcement, backlog applications, and current applications.

The difficulty with this approach is that it is impossible to predict the outcome of the 1493 outstanding compliance inspections and the follow-up work that may be necessary. Similarly with the complaint or enforcement files, until an assessment is done it is impossible to know how many of these complaints relate to long-standing violations and unlicensed works that have been in place so long as to make enforcement a difficult and time consuming proposition.

The current response did not appear to address the need for technical expertise and information identified by senior staff and other stakeholders on numerous occasions since 2000 to the present, and confirmed by the comments of the municipal board in 2006.

Finally, the department's plan did not appear to include any mechanism to take advantage of the benefits identified through its partnership with the Whitemud Watershed Conservation District (WWCD), improved turnaround time and conflict reduction through the use of local knowledge and early on-site review by affected parties.

Recommendation:
That the department develop a concrete and detailed work plan outlining how the new resources will be allocated to deal with the existing backlog, while also addressing new applications and enforcement concerns.

Note: In response to this recommendation the department has produced and recently provided us with a copy of a more detailed plan containing Goals and Objectives for the reduction of the backlog, and a description of its Process for Work Planning.

This document addresses some of the administrative and information gaps that gave rise to the recommendation for a concrete and detailed plan. It also sets specific performance goals that my office can now use to measure departmental progress on an annual basis.

A WORKABLE MODEL

At the beginning of this investigation a senior manager in the department suggested that licensing and enforcement can only work if it is recognized as the collective responsibility of all of the jurisdictional interests in the water system: the provincial government, municipalities, and conservation districts. The reasons identified in support of this proposition were the existence of multiple jurisdictions with diverse and sometimes divergent interests, the inability of any single party to provide adequate resources, and the need for everyone to agree on this approach.

Through our investigation we have heard the views of numerous individuals and organizations about what is wrong with the drainage licensing and enforcement system and what is required to fix it. We have also had an opportunity to become informed about the multi-layered and ongoing response of government to water related issues, and to consider the specific responses identified as intended to improve the licensing and enforcement system.

Based upon all of the above we have identified some of the elements necessary to administer a drainage licensing and enforcement system effectively.

A workable model must establish clarity of jurisdiction and responsibility for drainage licensing between the government, and municipalities and conservation districts. It must include a mechanism for utilizing local knowledge of the existing drainage systems and for considering the existing plans of municipalities and conservation districts on a watershed basis, against the backdrop of the provincial waterway system.

Municipalities and conservation districts must be subject to the licensing requirements of the Act and, when they break the law, to the enforcement provisions of the Act.

The licensing and the enforcement systems must be provided with adequate staff together with the necessary expertise and technical information to perform their respective functions. Enforcement measures must be sufficient to act as a deterrent.

A clear distinction in law and policy is required between maintenance of the existing drainage system and proposed new water control (drainage) works. As well, a distinction is needed between the information required from drainage licence applicants, and the information prepared by departmental staff completing assessments of those proposed works to determine the impact on other landowners, the provincial waterway system, and the environment.

The cumulative impact of drainage, both in terms of the impact on affected landowners, and on the provincial waterways into which the water from drainage projects ultimately flows, needs to be considered in assessing licence applications. As well, the impact on water quality must be a consideration in the assessment of drainage licence applications.

The department must have the necessary information and expertise to make the licensing and enforcement decisions and to defend the correctness of those decisions when they are challenged or appealed.

Elements of that workable model exist already in the pilot project the department has been involved in for many years. The lessons learned from that pilot project can and should be incorporated into a new plan.

The Whitemud Experiment

Beginning in 2001, the department and the Whitemud Watershed Conservation District (WWCD) undertook a two year pilot project that increased the involvement of the WWCD in the provincial drainage licensing process. This partnership effectively altered the process for landowners seeking to obtain a drainage licence within the district's boundaries.

The WWCD is one of the four districts that has responsibility for provincial waterways within its boundaries. It is responsible for the management of 760 kilometers of provincial waterways and 1256 provincial crossings on behalf of the Crown.

The stated goals of the WWCD were to have more local input into drainage licensing decision making, providing greater control for water management at a local level, and to provide an efficient drainage licensing process.

Under the new process the WWCD receives drainage licence applications and facilitates an "*... on-site meeting in which the application would be reviewed and/or modified with those who would be affected (neighbours, local council, district, etc) present*". This allowed for more local input and compromise. The board of the WWCD would then review each licence application at its monthly meetings to ensure compliance with the district's management plan.

Conservation (as it then was) committed a staff member for 10 days per month throughout the two year pilot project while retaining sole responsibility for enforcement and final issuance of the licences.

The board described the success of the project in terms of numbers, indicating that 190 of the 198 files received had been completed in that two year pilot project. They described the benefits to the WWCD as including an "*...increased understanding for the applicants, neighbours, rural municipalities and districts. An opportunity to promote conservation programs and an opportunity to take a pro-active role in drainage concerns*".

The benefits to the government were identified as increased participation in the licensing process; increased efficiency (5-6 week turnaround as compared to 6-18 months, according to the district); increased local involvement; and reduced work load, as meetings were arranged by the district and assessment reports and licences were actually prepared by the district.

Concerns expressed by departmental staff and others include the difficulty of getting consensus among multiple municipal participants who have potentially competing interests. This of

course will be a concern under any administrative system, as it is currently. The question is whether it can be addressed in an administrative system that recognizes competing interests, and creates a mechanism for dealing with them within the parameters of the law.

Despite the apparent success of the Whitemud "pilot project" in terms of the application of local knowledge, the reduction of disputes between landowners and the apparently improved application turn around time, expansion of the project to other parts of the province has been slow. The department advises that it is in the process of formalizing similar partnerships with the Cooks Creek Conservation District and the Pembina Valley Conservation District.

LICENSING MODEL

One of the advantages of having the people directly affected by the proposed work involved in water rights licensing, in addition to departmental staff, is that they can bring local knowledge of water and terrain to the process. Involving people directly affected by proposed works can result in modifications that reduce conflict once a licence is issued. There has also been a suggestion, supported by some evidence, that local involvement would increase the speed with which licence applications are processed and also reduce conflict among landowners.

In reviewing the evidence from conservation districts, we noted that the most frequently offered suggestion was a more active role for conservation districts in licensing, with no involvement in enforcement.

Conservation districts would appear to be a logical choice to partner with the government in water licensing. They have an interest in water, one that is increasing as more water responsibilities are being transferred to them by statute. As locally controlled bodies, they possess the requisite local knowledge of drainage. Finally, there has already been a successful pilot project demonstrating that a department/conservation district licensing partnership can work.

The possibility of creating further partnerships between the department and conservation districts has been acknowledged by departmental staff, who have noted that two conservation

districts are partnering with the department to license drainage within their districts and a number of others have expressed an interest in doing so. Departmental staff have gone as far as acknowledging that such partnerships could "eventually address the majority of licensing needs of Agro Manitoba".

More recently the department's conservation districts program discussion document Framework for the Future, appears to contemplate a role for conservation districts that could foster such partnerships. One of the goals identified in that document is that:

> *"Conservation districts will have the appropriate authority and responsibility for water management within their watersheds in accordance with provincial policy and legislation."*

In aid of that goal the province has stated objectives that include:

- *CDs are responsible for planning and co-ordinating all surface water management within the watershed.*

- *The province will work with CD boards on private and municipal water control works licensing.*

- *All CDs complete a surface water management plan and related policies. The plan addresses security issues including the rights of downstream landowners, cumulative effects of land use, flooding, drought, water conservation, drainage and fisheries management.*

- *CDs prepare and administer a water budget for the watershed.*

- *All provincial, municipal or private water control works and crossing systems recognize local priorities reflected in a surface water infrastructure management strategy prepared by the CD board (separate from an IWMP).*

An enhanced role for conservation districts in the licensing process is also consistent with the province's response to the Lake Winnipeg Stewardship Board's recommendation on local involvement. The board recommended that:

> *"Watershed management districts should be responsible for managing all issues within their jurisdictions, including in-field drainage activities and the drainage of natural wetlands."*

In a status report on the implementation of the Board's recommendations the province noted that:

> *"Discussions are on-going with conservation districts to implement this recommendation. This arrangement is being implemented within three conservation districts at present: Whitemud Watershed Conservation District; Cooks Creek Conservation district (agreement expired in 2005); and Pembina Valley Conservation District . Ultimately, some Conservation Districts will have an interest in undertaking this role while others will not, in which case the Manitoba Water Stewardship will retain responsibility for all aspects."*

The WWCD model has many appealing features pertaining to licensing. An examination of this model, combined with our examination of the existing provincial model, and department and conservation district observations about that model, reveals some of the necessary elements for success.

The provincial government – conservation district partnership option appears to have the support of municipalities, as expressed through the AMM and the representative body of conservation districts, the Manitoba Conservation Districts Association. We noted however that not all conservation districts have expressed an interest in participating in licensing.

The publication of Framework for the Future and the resulting consultation between the province and conservation districts is an opportunity for the province to *"...work with CD boards on private and municipal water control works licensing."*

At the same time the department is proceeding to give effect to its plans for integrated watershed management planning. This may be the practical method by which conservation districts, acting as water planning authorities set drainage policies. The department has advised us that:

> *"An IWMP [Integrated Watershed Management Plan] developed by CDs in their role as water planning authorities includes a number of water management assessments, plans and strategies. In the early stages an authority would develop a state of the watershed report, source water protection plan and through public consultation identify a vision for the watershed in the future. Outcomes from the first stage will direct the authority to develop secondary plans and strategies to assist in implementation. One of the secondary plans may be a surface water management plan. This secondary plan incorporates and considers impacts and functions of wetland, aquatic habitat, water supply retention and drains within the watershed. Manitoba Water Stewardship has set a pace for authorities to complete the first stage of planning in a 24 month period on signing of an agreement with the province. The development of secondary plans in the implementation stage can occur over the next 8 years depending on the priority set by the community and complexity. An IWMP would be revised on a 10 year cycle to see if it is meeting the community's established or changing needs. Currently 8 watershed authorities have been established since 2007 to develop IWMPs and the department will encourage the establishment of 3 new authorities to develop IWMPs annually."*

While the department's plan appears to make sense in the long term, it needs to include an expedited mechanism for incorporating the lessons learned from the successful licensing project already in effect in at least one conservation district. Knowledge acquired from the WWCD can be implemented independently of the integrated watershed management planning process.

The department has acknowledged the benefits of the Whitemud model and advised us that greater use of that model will be included in its ongoing consultations with conservation districts. In light of that ongoing consultation we have asked the department to provide a report on the outcome of the consultation process and in particular how the future relationship

between the department's licensing and enforcement branch and conservation districts addresses the concerns expressed by CDs with respect to licensing and enforcement.

In light of the department's current restructuring and significantly enhanced resources, along with its efforts to update licensing and enforcement policies, we have also asked the department to provide the details of how that restructuring incorporates the use of conservation districts in licensing decisions.

In response to our ongoing inquiries, the department has advised that all Water Resource Officers are assigned to a geographic area to facilitate building local knowledge and relationships, and that geographic areas are defined primarily along conservation district boundaries where a conservation district exists.

Recommendations:

That the department develop a plan, in consultation with conservation districts, to involve conservation districts in all licensing decisions based on the model currently in use within the Whitemud Watershed Conservation District.

That the department advise conservation districts of the restructuring of the Water Control Works and Drainage Licensing section, and its plans for addressing the licensing and enforcement backlog, and discuss the role conservation districts wish to play in this process.

That the department assess the staff and resources necessary for a new licensing process.

Enforcement Model

Although the Whitemud model was and is a successful licensing model, it did not involve any enforcement. The absence of any effective corresponding enforcement was one of the hurdles identified by WWCD, describing the provincial enforcement effort as *"weak and inefficient"*.

In January 2003, a few months before the end of the first two year pilot project, the WWCD advised the Minister that *"By being more involved in the process, the district has become acutely aware of the frustration within the district at enforcement for offences under The Water Rights Act"*.

The Minister was advised that the WWCD had passed a resolution requesting that *"Manitoba Conservation undertake a more pro-active approach to enforcement under The Water Rights Act. The board suggested that direct fines for offences be considered"*. This resolution was circulated to its partner councils (municipalities) with sixteen of eighteen municipal councils passing the same motion.

Despite the early identification of inadequate enforcement as an impediment to the success of the project, and despite the specific request made by the district, increased enforcement was not forthcoming.

The WWCD described the consequences of longstanding neglect of enforcement in these terms:

> *"Without enforcement by your department, the WWCD board, its staff and the process is exposed as weak and incompetent. The individuals who know nothing will happen to them simply undertake works and wonder why the honest people waste their time with the process"*.

In its frustration, the board spoke candidly of issues that had been raised previously by staff but never addressed by the department, including the "tension that arises between water rights enforcement and the requirements of the agricultural community". The board's comments to the Minister on this issue were:

> *"The board understands politically the delicate situation to enforce upon a producer facing the hardships they must face in today's economy. But there must be an understanding that any illegal works are causing hardship upon one, two, 10 or up to hundreds of downstream producers who are facing the same hardships as the offender."*

The board also elevated the discussion of enforcement from disputes between individual landowners to higher conservation and environmental concerns, and advised the Minister that:

> *"Regarding downstream impacts, it must also be understood not only quantity issues exist but, perhaps more importantly, water quality concerns are amplified. Without proper control pollutants are added to the watershed, buffer zones are removed and sediment collection areas are lost".*

The Whitemud partnership was renewed for a single year after the department received approval for increased staff resources and indicated that it was making efforts to improve enforcement.

While the WWCD partnership may have provided a model for a successful licensing mechanism, the absence of enforcement has weakened its effectiveness. Because of its frustration with the lack of enforcement, the WWCD developed its own enforcement proposal in 2004, which it submitted to government without result. As enforcement is still an issue, we examined the 2004 enforcement proposal developed by the district.

The district advised the government that it believed that to improve enforcement, a fine would provide the most advantage. It suggested a simple mechanism whereby conservation officers would issue a common offence notice (ticket) to any individual undertaking works without a valid licence or letter of permission.

The rationale for this was that in issuing a ticket, the conservation officer would not be required to assess works or gather statements, rather just observe work being conducted without a licence. This would then place the onus on the accused to obtain a licence or demonstrate that the work was not being done illegally.

The proposal for an enforcement project called for an individual with previous experience working for the department, to be hired on contract or retainer *"to be available immediately when a complaint or inquiry is received to conduct a site visit immediately or within 48 hr".*

The proposal was that the individual have the authority to deliver Stop Work Orders or lay formal charges under *The Water Rights Act*. The board noted in their view that if *"three to five individuals (chronic offenders) are dealt with efficiently numerous other concerns will be averted"*. The board requested the government "if legally possible" to issue direct ticketing within the enforcement pilot project.

The board noted that in its experience offenders had to be *"caught in the Act, in order for charges to stick"*. They concluded by saying "*as it stands today, the current process is not working, causing the general public and partner rural municipalities to lose confidence in the government and the WWCD"*.

We are advised by the WWCD that when enforcement has occurred, there has been an immediate and significant increase in licence applications, demonstrating the value of enforcement in increasing respect for the law.

We are advised as well that because the initial site meeting is an opportunity to discuss the concerns of those who might be affected by a drainage project, and to explore ways those concerns might be addressed, the model reduces complaints and, correspondingly, the need for enforcement.

WWCD also confirmed that it did not want to play a role in enforcement, underscoring the difference between the role of facilitator at the licence application process and the role of enforcement officer when the need for enforcement arose.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

The government must be commended for providing the department with an unprecedented infusion of resources with which to address significant and long-standing problems in drainage licensing and enforcement.

The department is at a critical juncture. With those new resources, the department must address a significant backlog and continue to process incoming applications and complaints requiring enforcement measures. At the same time, a new process for both licensing and enforcement needs to be designed and implemented that will address the problems and concerns identified by stakeholders, as outlined in this report. The process must be consistent with new government policies reflecting broader responsibility for water management, many of which are still in development and may not be concluded in the immediate future.

The recommendations in this report are intended to assist the department and its dedicated staff in achieving an improved administrative system for licensing and enforcement, building on the work already underway. We will ask the department to provide updates related to the progress in achieving this goal.

LEGISLATIVE FRAMEWORK

The existing legislative framework is fundamentally sound and provides the authority and direction necessary to fix the current licensing and enforcement system. There may always be circumstances where a particular demand for a drainage licence cannot be met, or met quickly enough in the view of the applicant. However, it is important to maintain a balance between those demands and the rights of other affected landowners, and consideration for the environment. While we have identified areas that could be improved or clarified, this relates as much to changing circumstances and inadequate resources, as it does to perceived flaws in the Act or Regulation. Specific amendments intended to update and strengthen the licensing and enforcement system to meet current circumstances are set out in recommendations below.

LICENSING PROCESS

The responsibilities of the applicant and the department in the licence application and approval process need to be clarified. There should be a distinction between the licensing of new water control works and the licensing of maintenance works on existing drainage.

The licence application assessment and approval process can be improved. An improved model must involve conservations districts (where they are willing to participate) and have a means of using local knowledge during an initial on site review.

Recommendations:

1. **That the Department clarify how technical information required of drainage licence applicants will be obtained and who will be responsible for the cost of obtaining that information; and that this be included in a policy available to applicants. I would ask that the department provide me with a copy of that policy. (Page 37)**

2. **That the Department consider an amendment to *The Water Rights Act* to create a distinction between the creation of new water control works, and maintenance or minor works; and include a clear definition of "maintenance". (Page 69)**

3. **That the Department consider an amendment to *The Water Rights Regulation* to create an expedited application process when appropriate for licensing maintenance and minor works. (Page 69)**

4. **That the department develop a plan, in consultation with conservation districts, to involve conservation districts in all licensing decisions based on the model currently in use within the Whitemud Watershed Conservation District. (Page 84)**

ENFORCEMENT

Enforcement needs to be significantly improved. Enforcement should be functionally separated from the advisory role of the department in licensing. Enforcement action needs to be taken

immediately when the licensing provisions of *The Water Rights Act* are violated. Fines need to be increased and the need for direct enforcement in certain circumstances should be reviewed.

5. **That the department clearly distinguish between advisory and support functions, and the regulatory, or licensing and enforcement functions in policy and job descriptions. (Page 61)**

6. **That the department develop a policy to be consistently applied to take enforcement action when illegal drainage is occurring. (Page 56)**

7. **That *The Water Rights Act* enforcement powers and penalty provisions be amended to be consistent with the offence and penalty sections of *The Water Protection Act.* (Page 56)**

8. **That the department review whether statutory authority should be provided to allow drainage officers to issue immediate stop work orders and orders requiring remedial action. (Page 56)**

9. **That the department review the adequacy of enforcement measures available to staff to determine if further powers are needed to stop unlicensed drainage. (Page 56)**

Resources

The government has significantly increased the department's staff resources over the last two fiscal years. I was concerned however that the department's requests for additional funding were not accompanied by a concrete and detailed work plan to address the current backlog in a timely manner, nor had such a plan been available when requested by our office.

We suggested to the department that its plan must include an analysis of the licensing and enforcement backlog and a concrete plan for its faster resolution.

The plan must include a model of shared responsibility consistent with current government policy on licensing within watershed planning and management through conservation districts as described in Framework for the Future, and in its response to the recommendation from the Lake Winnipeg Stewardship Board. That plan must have a way of including conservation districts in drainage licensing decisions now, and not wait for the outcome of the two to ten year long term plan outlined in the department's Integrated Watershed Management Planning document.

The department has provided us with a document setting out the principles and processes guiding its plan, and specific goals and objectives that can be used to measure success. I have accepted the department's position that further detailed planning must be incremental, with further steps and improvements based upon the results of initial activities and analysis. It is on the basis of that document, and the department's commitment to implement the recommendations below, that my office will monitor the department's progress toward administrative improvement in the years to come.

10. That the department develop a concrete and detailed work plan outlining how the new resources will be allocated to deal with the existing backlog, while also addressing new applications and enforcement concerns. (Page 76)

11. That the department develop a provincial database that requires that all licence applications and complaints are recorded. The database needs to allow the tracking of applications and complaints from acceptance to conclusion. This database should include the necessary forms and a mechanism that permits management to monitor progress. (Page 64)

12. That the department assess staff and resources necessary for a new licensing process. (Page 84)

COMMUNICATION

Confidence in both the licensing and enforcement systems must be restored. This will require a significant communication effort on the part of the government to demonstrate both its willingness and capacity to address the problems currently facing drainage licence applicants and those who have been harmed by unlicensed drainage.

Users of the drainage licensing system should be informed about the need to consider the environmental impact of drainage and how to reduce that impact.

The requirements and provisions of the Act and Regulation relating to both licensing and enforcement need to be clearly communicated to the constituent public, as does the role of departmental staff and others involved in licensing decisions.

The department needs to engage conservation districts immediately in discussions about both its plan to address the current licensing and enforcement backlog, and its long term plan for processing licence applications and responding to complaints.

13. **That the department complete and publish its proposed "environmentally friendly" drainage manual as a priority. (Page 49)**

14. **That the department advise conservation districts of the restructuring of the Water Control Works and Drainage Licensing section, and its plans for addressing the licensing and enforcement backlog, and discuss the role conservation districts wish to play in this process. (Page 84)**

15. **That the department develop a clear public policy on enforcement and communicate it to municipalities, conservation districts and the general public. (Page 61)**

Departmental Response

From December 2007 to April 2008, we discussed our findings and draft report with the department, and invited officials to provide comments and respond to specific concerns. We believe that this process allowed us to directly communicate the concerns of those affected by water licensing and enforcement with the department. We were also able to highlight the administrative improvements we believe are necessary to address the concerns identified by our investigation.

It also provided me with an understanding of the extent to which the department was working to address the concerns identified, and the department's commitment to restoring public confidence in the licensing and enforcement process.

In response to our final report the department wrote to us on April 21, 2008 to advise that:

> *The Department of Water Stewardship would like to thank the Ombudsman's Office for its extensive work in reviewing the history of drainage concerns in Manitoba, and in creating this thorough report. Decisions on individual drainage projects can be complex, and need to balance the interests of affected landowners, the needs of agriculture and impacts on the environment.*
>
> *The Department accepts the Ombudsman's recommendations. As this report outlines, a number of significant changes have already occurred to meet the goals of Manitoba's water strategy. This report provides valuable assistance to the Department in taking stock of our progress to date and in reviewing our priorities for the future.*

The Department believes that recent measures, together with the actions to address this report's recommendations, will result in a substantially more effective drainage licensing and enforcement system. Recent measures include:

- *Amending The Water Rights Act in 2005 so that an appeal of a Ministerial Order to remove illegal water control works does not stay the Order pending the appeal.*

- *Amending The Act further in 2006 to improve its enforceability. The new provisions include the power to appoint officers to enforce the Act, new inspection powers, and the power to issue warrants authorizing searches and seizures of evidence.*

- *Creating a new Water Control Works and Drainage Licensing Section and more than doubling the number of staff positions within this section with the addition of 14 new positions in 2007 This new section and additional staff complement substantially increases the Department's capacity to effectively administer, enforce and communicate drainage licensing requirements.*

- *Establishing two new positions within the Water Control Systems Management Branch to provide technical engineering assistance to conservation districts, municipalities, and private landowners in the resolution of significant drainage concerns.*

- *Establishing additional Water Stewardship offices in Arborg, Stonewall, Shoal Lake, Swan River, Neepawa, Deloraine, Ste Anne, and St Laurent, with the latter two being staffed with bilingual Water Resource Officers.*

- *Strengthening senior management capacity with the addition of the new position of Director, Regulatory Services, to which the new Water Control Works and Drainage Licensing Section reports.*

- *Amending the Offence Notices Regulation under the Summary Convictions Act in March 2008 to introduce set fines for offences under The Water Rights Act. Offence Notices with prescribed fines can now be issued immediately at the site of the illegal activity, similar to the issuance of a traffic ticket.*

- *Upgrading equipment and software to facilitate licensing and enforcement activities.*

- *Entering data on licence applications, complaints, and enforcement activities into a database to facilitate tracking, performance measurement, and reporting. The current*

database has been used for many years in the Western and Red River Regions. A second GIS Operator has been hired to expand this database to the remainder of the province.

- *Expanding the Whitemud Licensing model to Cooks Creek and Pembina Valley Conservation Districts.*

- *Assigning all Water Resource Officers to a conservation district where one exists to facilitate development of local knowledge and relationships. Where conservation districts have not yet formed, officers have been assigned to a group of municipalities organized roughly along watershed boundaries.*

- *Working to inform municipalities, conservation districts, agricultural producers and environmental groups of changes to the Department's organization structure and goals for the immediate future through a presentation to the Association of Manitoba Municipalities in November 2007, participation in the Manitoba Conservation Districts Association's Annual Convention in December 2007, and hosting a booth at Ag Days in Brandon in January 2008.*

- *Implementing water protection measures recommended by the Lake Winnipeg Stewardship Board (see www.gov.mb.ca/waterstewardship/pdf/lake_winnipeg_ws/pdf)*

Actions to address the Ombudsman's recommendations will include:

- *Developing a policy that clarifies how technical information required of drainage license applicants will be obtained and who is responsible for the cost.*

- *Eliminating the existing drain maintenance exemption policy, developing a new definition of "maintenance" or "minor water control works" and establishing an expedited licensing process to authorize these activities subject to best management practices.*

- *Encouraging and supporting other conservation districts to set up a licensing process similar to the Whitemud model.*

- *Reviewing position descriptions to ensure that they clearly distinguish between advisory and regulatory functions.*

- *Reviewing The Water Rights Act and advancing amendments as necessary and appropriate to further strengthen compliance and enforcement. The Department will review penalties in other Acts including The Water Protection Act in determining appropriate fine levels.*

- *Refining the current plan to address the backlog in licensing, enforcement, complaint investigation, and compliance checks.*

- *Expanding the existing database to cover all of southern and central Manitoba, and implementing a process to monitor progress toward addressing the backlog.*

- *Continuing to assess staff complement and reassign resources to most efficiently and effectively administer the licencing process.*

- *Continuing to work toward the development of an Environmentally Friendly Drainage Manual. The Department plans to release this manual in the present fiscal year.*

- *Increasing the effort to inform municipalities, conservation districts, agricultural producers and environmental groups of program changes.*

- *Releasing interim licensing and enforcement policy documents developed in consultation with representatives from conservation districts, municipalities, agricultural producers and environmental agencies, and reviewing these policies over the course of the next year in light of the Ombudsman's report and other comments.*